Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GERALD D. D'AMELIA, JR.,

Petitioner,

FRANCIS D. PHILLIPS, II,

Defendant,

VS.

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: November 22, 1996

59 pp

QUESTION PRESENTED

Did the lower courts err in creating an unprecedented Establishment Clause exception to the absolute immunity afforded prosecutors under § 42 U.S.C. 1983?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision in the instant action rendered by the Second Circuit Court of Appeals. The Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, which held that a prosecutor is not entitled to absolute immunity under §1983 for certain acts undertaken during the course of determining whether or not to prosecute a criminal defendant. These acts were subsequently

found to violate the Establishment Clause of the United States Constitution.

I. Opinions and Orders Below

The April 22, 1996 decision of the Second Circuit Court of Appeals which is the subject of this petition, *Doe v. Phillips*, 81 F.3d 1204 (2d Cir. 1996), is annexed and cited as Appendix "A."

The decision of the United States District Court in the Southern District of New York, rendered on June 30, 1995, which has not been officially reported, is annexed as Appendix "B."

A petition for rehearing and suggestion for rehearing *in banc* was denied on October 30, 1996 by the Second Circuit Court of Appeals. The order denying the petition for rehearing is annexed as Exhibit "C."

A motion for a stay of the mandate pending application for a writ of certiorari in this Court was made on November 6, 1996. Petitioner was orally informed by the Second Circuit on November 20, 1996 that the motion for the stay was granted, but that this Petition must be filed on or before November 22, 1996.

II. Jurisdiction

A timely filed petition for rehearing and suggestion for rehearing *in banc* regarding the April 22, 1996 decision of the United States Court of Appeals for the Second Circuit was denied on October 30, 1996. This petition for certiorari is filed within 90 days of the denial of the petition for rehearing and suggestion for rehearing *in banc*. The Court's jurisdiction to review the case rests upon 28 U.S.C. § 1257(a).

III. Constitutional Provision Involved

The constitutional provision at issue is the Establishment Clause contained in the First Amendment of the United States Constitution, applicable to the states by the Fourteenth Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *

U.S. Const. Amend. I.

IV. Statement of the Case

This case involves the nature and scope of the doctrine of absolute immunity as applied to prosecutors in light of a decision rendered in the Second Circuit of the United States Court of Appeals, affirming the decision of the United States District Court for the Southern District of New York. These decisions, in effect, qualify the doctrine of absolute immunity to exclude its application to circumstances implicating the Establishment Clause of the First Amendment of the United States Constitution.

A. Preliminary Statement

We believe that the Second Circuit decision is contrary to established precedent of this Court and other circuits which unequivocally hold that prosecutors are immune from liability for all acts committed in the course of initiating and pursuing, or opting not to pursue a criminal prosecution. *See e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976). Under this Court's analysis, a prosecutor engaging in conduct which is intertwined with the prosecutorial function of determining whether, or under what conditions, a criminal case should be dismissed is absolutely immune from liability with respect to these actions, no matter how misguided, improper, inappropriate, or even unconstitutional that conduct is subsequently determined to be.

The prosecutorial conduct which is at issue here -- offering in the nature of a plea bargain to drop criminal charges if the defendant agreed to swear to her innocence on a bible in her family church -- was no doubt inappropriate. Indeed, in all instances in which the doctrine of absolute immunity is applied to relieve a prosecutor of liability under §1983 there exists some form of irregular prosecutorial conduct, actual or alleged.

Heretofore, conduct performed in the context of deciding whether or not to pursue particular criminal cases has been found to fall within the protection of the doctrine of absolute immunity. In *Doe v. Phillips*, the Second Circuit has carved out an unprecedented exception to the complete defense of absolute immunity. It has done so by focusing solely upon the perceived religious aspects of the prosecutorial conduct at issue.

B. Background Facts

Respondent ("Jane Doe") was arrested in October 1992 and charged with felony rape in the third degree, felony sodomy in the third degree and endangering the welfare of a child. (JA-145) The allegations were made by Doe's fourteen year-old son, Nicholas, the alleged victim of the sexual abuse. (JA-145)

Prosecutor Gerald D'Amelia ("Prosecutor D'Amelia"), of the Orange County District Attorney's Office, who had graduated from law school just two years prior, was assigned to the case. During his investigation, Prosecutor D'Amelia became aware that Jane Doe's family was exceedingly dysfunctional with a long history of familial problems. (JA-136-37)

He also learned that the Doe family was intensely religious. (JA-136)

As his investigation progressed, Prosecutor D'Amelia learned that, after years of being "locked into a self-destructive relationship with her husband" ("John Doe"), the Does had formally separated in October 1988. (JA-186) Jane Doe, who had previously been hospitalized as a result of physical and emotional abuse, was issued an order of protection against her estranged husband. (JA-16)

Following their separation, Jane Doe lived in New Jersey with her parents and her two sons. (JA-176) Shortly thereafter, John Doe kidnapped Nicholas and took him to New York State where they lived in an abandoned house for approximately one week. (JA-184) Jane Doe claimed that Nicholas

was never the same after this incident, but that he became increasingly violent, paranoid and distrustful of her and the extended family with whom they lived. (JA-184)

Nicholas was hospitalized in January 1989 at the recommendation of his school principal. (JA-176) During his hospitalization, family members were evaluated by various mental health professionals. Jane Doe was described by mental health professionals as "passive and dependent" with "very poor self-esteem." (JA-186) She admitted that she had a "history of impulse control problems" and had threatened to murder her own sister. (JA-187)

John Doe, a Yugoslavian National, was described by mental health professionals as a "mysterious figure" who engaged in unspecified "antisocial activities." (JA-186-87). Although he blamed his wife for their son's emotional problems, it was his stated desire to reunite with her. (JA-187) He apparently assumed that an award to him of the custody of his son would accomplish this "automatically." (JA-187)

Nicholas was described by mental health professionals as "completely out of control," "quite egocentric and narcissistic . . . [and] never . . . appropriately disciplined." (JA-180,187) After his parents' separation, he was used by his father to deliver threats of physical harm to his mother, if she did not agree to return to the marital relationship. (JA-176) At the time that Nicholas was hospitalized, he was described as "highly anxious" and claimed to hear his father's voice and see "eyes on his bedroom wall." (JA-176) He was "stuttering excessively, had developed a rash and was physically and verbally attacking his maternal grandfather." (JA-176) He "constantly" threatened to commit suicide if he was not allowed to live with his father. (JA-180)

Despite concerns about his father's stability and desirability as a parent, Nicholas was ultimately released to his custody. (JA-182,187) John and Nicholas Doe thereafter resided in Orange County, New York.

In June 1991, a petition alleging neglect of Nicholas by his father was filed in Orange County Family Court. (JA-17) Supervision of the home was awarded to the Department of Social Services which recommended that Nicholas be placed in foster care. (JA-177) In August 1991, Jane Doe returned to Orange County, at Nicholas' request, and cared for both of her children in a rented apartment. (JA-177) In October 1992, Nicholas first raised the allegations that his mother had sexually abused him.

C. The Decision Not To Prosecute

It must be stressed at the outset that the Jane Doe criminal case presented Prosecutor D'Amelia, an inexperienced prosecutor, with very unusual circumstances. Although criminal sexual abuse charges are always difficult to corroborate, the Doe case involved allegations made among members of a dysfunctional family with a long history of problems. In these types of cases, great deference is given to the willingness of family members to cooperate with the prosecution.

As the investigation progressed, Prosecutor D'Amelia began to have serious doubts about whether the allegations of sexual abuse were true, or, if true, whether the evidence would support a conviction. (JA-85-86, 112) He became aware that the allegations may, in fact, have been initiated by John Doe, who claimed that future events were revealed to him in his dreams. (JA-85) John Doe also claimed to have had "visions" in which Jane Doe sexually abused Nicholas. (JA-137)

Several interviews with Nicholas appeared to confirm Prosecutor D'Amelia's suspicion that the sexual abuse allegations might be untrue. It increasingly appeared that John Doe may have pressured Nicholas into making the charges. (JA-137) However, the charges were serious enough that they could not lightly be dismissed and the father and son continued to insist that the case be vigorously prosecuted.

In April 1995, Nicholas and John Doe informed Prosecutor D'Amelia that they no longer wished to cooperate with the

prosecution. (JA-137-38) Both indicated that they would agree to drop all of the charges, if Jane Doe would agree to swear in the family's local church to her innocence of all of the sexual abuse charges. (JA-137-38)

Although Prosecutor D'Amelia initially rejected the suggestion, he came to believe that agreeing to allow Jane Doe to take the oath might best serve the interests of all involved, including the respondents, the petitioner and the public he was sworn to protect. Prosecutor D'Amelia was also mindful of John Doe's history of volatility and believed that the matter would be best resolved if there could be obtained a consensual resolution. (JA-208)

Ultimately, after analyzing all of the facts and informally discussing the matter with several colleagues, Prosecutor D'Amelia decided to relay John's and Nicholas' suggestion to Jane Doe's counsel in the nature of a plea bargain, *i.e.*, if Jane Doe would agree to swear to her innocence on a bible in her family church, he would arrange to have all of the criminal sexual abuse charges summarily dismissed.

After consulting with her client, Jane Doe's attorney confirmed in writing to Prosecutor D'Amelia that Doe was agreeable to taking an oath of innocence, in exchange for a dismissal with prejudice of all charges relating to the alleged sexual abuse of her son. (JA-69) Jane Doe then took the following oath in her family's church with counsel present:

> I, [Jane Doe], swear on this Bible that I did not have any form of sexual contact with my son, on any occasion, so help me God.

Immediately following the oath, Prosecutor D'Amelia arranged to have all of the criminal charges formally dismissed. (JA-139)

D. Procedural History of the Case

In September 1993, Jane Doe commenced this action in the United States District Court for the Southern District of New York seeking compensatory and punitive damages pursuant to

42 U.S.C. 1983. (JA-15-29) In her complaint, Jane Doe alleged, *inter alia*, that Prosecutor D'Amelia's actions, culminating in the dismissal of all criminal charges, violated the Establishment Clause. Jurisdiction was conferred upon the Southern District of New York by 29 U.S.C. 1331, 1343, 1391 and 2201.

Prior to the completion of discovery, D'Amelia filed a motion for summary judgment based upon the doctrines of absolute and qualified prosecutorial immunity.[1] D'Amelia's motion was denied. An appeal to the Second Circuit was subsequently denied, as was a petition for rehearing and suggestion for rehearing *in banc*.

This petition seeks a review of the rulings below and a determination that Prosecutor D'Amelia is entitled to absolute immunity for acts, however misguided, which he undertook in his role as prosecutor.

V. Reasons for Granting The Writ

This case presents the issue of whether there are certain actions undertaken by a prosecutor in the course of determining whether or not to prosecute a particular criminal defendant which are exempt under § 1983 from the application of the doctrine of absolute immunity. Put another way, the issue is whether the doctrine of absolute immunity should be qualified to exclude its application to circumstances where a prosecutor attaches a condition for the dismissal of all criminal charges which may subsequently be determined to violate the Establishment Clause.

The standard governing the application of absolute immunity is set forth in *Imbler v Pachtman*, 424 U.S. 409, (1976). Whether absolute immunity attaches depends upon whether the conduct at issue was "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Prosecutorial decisions with respect to commencing a prosecution

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[1] Francis D. Phillips, II was ultimately dismissed from the case.

are absolutely protected. *Id.* at 424-25. Likewise, absolute immunity applies to protect a prosecutor from civil law suits based upon a decision not to prosecute, unless a demand "foreign to the prosecutor's office," such as conditioning dismissal in a manner inuring to the personal benefit of the prosecutor, is imposed as a condition of dismissing charges. *Schloss v. Bouse*, 876 F.2d 287, 290-92 (2d Cir. 1989).

Under this standard, Prosecutor D'Amelia should be absolutely immune from civil law suit because the actions complained of were part and parcel of his prosecutorial decision not to prosecute Jane Doe. The condition agreed to by Jane Doe in consultation with her attorney was not "foreign" to the function of the prosecutor's office, or beyond the Prosecutor's authority. It involved an act, however misguided or inappropriate, eliciting a statement under oath on the very subject of the prosecution. The condition was intimately intertwined with a core function of a prosecutor; deciding whether to prosecute, or dismiss criminal charges. *See Brodnicki v. City of Omaha*, 75 F.3d 1261, 1268 (8th Cir. 1996)(decisions relating to initiation and dismissal of cases are at the very heart of a prosecutor's function as advocate for the State); *see also*, *McGruder v. Necaise*, 733 F.2d 1146, 1148 (5th Cir. 1984) (even the extreme and reprehensible actions of a prosecutor using his role to intimidate citizens from exercising constitutional rights does not lift the decision to maintain criminal prosecution from the prosecutorial activities protected by *Imbler*).

Applying this Court's historical analysis, the various circuits have correctly held that prosecutorial conduct which violated defendants' First, Fourth, Fifth, Sixth and Eighth Amendment rights, falls within the protection of the doctrine of absolute immunity. *See e.g.*, *Brodnicki v. City of Omaha*, 75 F.3d 1261 (8th Cir. 1996) (prosecutor who allegedly violated plaintiff's due process rights was entitled to absolute immunity); *Mendenhall v. Goldsmith*, 59 F.3d 685 (7th Circuit), *cert. denied*, __ U.S. ___, 116 S. Ct. 568, 133 L. Ed. 2d 492 (1995) (prosecutor who allegedly violated defendant's constitutional rights by conditioning dismissal of civil

forfeiture action on plaintiff's agreement not to use real property for an "adult use" was entitled to absolute immunity); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (absolute immunity granted prosecutors who allegedly violated plaintiff's Fourth, Fifth, Sixth and Eighth Amendment rights by numerous improper acts); *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995)(prosecutor absolutely immune from liability for unjustifiably removing defendant's children, directing arrest without probable cause, maliciously prosecuting, conspiring to present false evidence, withholding exculpatory evidence and deliberately suppressing *Brady* material); *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994)(prosecutor who allegedly violated constitutional rights of due process absolutely immune because professional evaluation and preparation of evidence for trial are prosecutorial acts); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, (10th Cir. 1991) (prosecutors who allegedly violated plaintiff's constitutional rights by threatening to file criminal charges unless plaintiff stopped practicing medicine entitled to absolute immunity); *Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991)(prosecutor who violated constitutional rights by compelling plaintiff to resign from employment in order to avoid a perjury charge entitled to absolute immunity); *McGruder v. Necaise*, 733 F.2d 1146 (5th Cir. 1984) (prosecutors who allegedly violated plaintiff's constitutional right to free and equal access to the courts by threatening to pursue criminal charges unless plaintiff dismissed civil action was entitled to absolute immunity).

Indeed, this Court declined to carve out *any* exception to the general rule that prosecutors are immune under Section 1983 for all acts, even unconstitutional acts, which are committed in the course of doing their jobs as prosecutors, even though such immunity might leave genuinely wronged criminal defendants without civil redress. *Imbler v. Pachtman*, *supra* at 427, 431 n. 34. In so doing, the Court noted that the ultimate fairness of the operation of the judicial system itself could be weakened if a prosecutor could be "called upon to respond in damages for his error or mistaken judgment." *Id.* at 426. Moreover, this Court found that drawing a distinction between various types of unconstitutional conduct, *e.g.*, the

willful use by a prosecutor of perjured testimony contrasted with the willful suppression by a prosecutor of exculpatory information, was unacceptable "as a matter of principle", since one was no less an infringement of defendants' rights than the other. *Id.* at 431 n. 34. This Court also concluded that such distinctions were not susceptible of practical application. *Id.*

To the contrary, this Court held that prosecutors are immune under Section 1983 for all acts, even unconstitutional acts, which are committed in the course of doing their jobs as prosecutors. That general rule should apply regardless of whether a particular constitutional provision in hindsight is found to have been violated.

A. The Second Circuit Opinion Focuses Upon The Particular Conduct, Rather Than The Context In Which It Occurred

As demonstrated above, absolute immunity insulates prosecutorial conduct -- however outrageous -- so long as it occurs as an integral part of the prosecutorial function, such as deciding whether to prosecute, or to dismiss criminal charges. Absolute immunity attaches to the function being furthered, not the manner in which it is performed. *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994).

Absolute immunity defeats a civil suit at the outset, so long as the official actions were within the scope of the immunity. *Imbler v. Pachtman*, *supra* at 418 n. 13. Qualified immunity, on the other hand, depends upon the circumstances and motivations of the prosecutor's actions. *Id.*

This distinction is critical to a proper analysis of whether or not absolute immunity should apply in a particular instance. If the conduct occurs while prosecuting a case, or during the process of deciding whether to prosecute or dismiss charges, it is absolutely protected, regardless of whether the conduct itself was misguided, inappropriate, or even unconstitutional. Under the functional approach, Prosecutor D'Amelia's conduct, however inappropriate in the Court's view, must be

protected because it occurred in the context of deciding whether or not to prosecute.

In a radical departure from the historical approach to determining prosecutorial immunity, the Second Circuit held that no immunity attached in this case because the condition imposed by Prosecutor D'Amelia -- that Doe swear to her innocence in her family church -- was either beyond his authority, or performed in the clear absence of all jurisdiction. (A-12). (citations omitted). However, whether a prosecutorial act is foreign to the prosecutor's office and, hence, not deserving of absolute immunity, does not depend on whether the actions were reprehensible, unethical, unconstitutional, or otherwise inappropriate. The circumstances and motivation of the prosecutor are irrelevant, so long as he or she was performing his official duty. There are numerous examples of prosecutorial conduct of a much more egregious nature involving the alleged violation of constitutional rights which have been found to be deserving of absolute immunity. *See*, *e.g.*, cases cited *supra* at pp. 9-10.

The Second Circuit, itself, has previously articulated examples of willful, criminal conduct which might not be protected by absolute immunity. These examples included a demand for a bribe, or for sexual favors. *Schloss v. Bouse*, 876 F.2d 287, 291 (2d Cir. 1989). These types of acts differ markedly from the types of misconduct protected by absolute immunity in that they willfully serve a purely personal interest with not even a hint of any public function. As Justice Jacobs succinctly points out in his Dissent: "There is a difference between performing one's office, however disgracefully, and offering to sell it for purely personal benefit." (A-19).

The Second Circuit's analysis would have resulted in the denial of absolute immunity for prosecutors in each of the cases cited previously in which absolute immunity was found to apply. That is because the focus would have been shifted to the conduct, rather than the context under which it occurred.

For example, in *Dory v. Ryan*, the Court did not ask whether or not encouraging perjury was properly within the role of a prosecutor, but held that inquiry to be "immaterial" in the context of absolute immunity. According to the Court, the absolute character of absolute immunity is that it protects a prosecutor from Section 1983 liability for virtually all acts, regardless of motivation, if the conduct occurred in the prosecutor's function as an advocate for the State. *Dory v. Ryan*, 25 F.3d at 83.

Likewise, in *Pinaud v. County of Suffolk*, the Court did not ask whether it was a prosecutorial function to improperly increase bail, or make false representations to prompt a plea bargain, among other things. Clearly, they are not. Rather, the acts complained of in each of these cases, while perhaps unethical, deviant or violative of defendants' constitutional rights were "components of the initiation and presentation of a prosecution and therefore protected by absolute immunity." *Pinaud v. County of Suffolk*, 52 F.3d at 1149.

In each case, the Court properly inquired into whether or not the underlying conduct was intertwined with the prosecutorial function. If it was, the prosecutor was entitled to absolute immunity whether or not the conduct complained of was inappropriate, unethical, or even unconstitutional.

Applying the historical functional approach to the conduct at issue in this case militates in favor of a finding of absolute immunity. Prosecutor D'Amelia, whose conduct was in no way corrupt, immoral, or engaged in for personal gain, should also be protected. Prosecutor D'Amelia's activities -- making the decision of whether and when to prosecute -- were actions preliminary to the initiation of a prosecution and undertaken as an officer of the court. In short, his actions were intertwined with prosecutorial *functions* "to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. at 430.

B. Absolute Immunity Attaches To Demands Or Conditions Placed On A Defendant To Effect A Decision To Forego Prosecution

Absolute immunity applies where a prosecutor's decision not to prosecute is made dependant upon conduct to be performed by a defendant, even if the conduct or demand has nothing to do with the crime itself. In *Schloss v. Bouse*, the decision to forgo prosecution was made to depend upon the defendants' agreement to release from liability the municipalities and police officers who allegedly arrested and detained them in violation of their constitutional rights. *Schloss v. Bouse*, 876 F.2d at 289. The Second Circuit in *Schloss* held that the prosecutor was entitled to absolute immunity because the demand was in the nature of a plea bargain, which is not foreign to the office of a prosecutor. *Id.* at 291.

Other circuits are in accord. *See Mendenhall v. Goldsmith*, 59 F.3d 685 (7th Circuit), *cert. denied*, __ U.S. ___, 116 S. Ct. 568, 133 L. Ed. 2d 492 (1995) (prosecutor who allegedly violated defendant's constitutional rights by conditioning dismissal of civil forfeiture action on plaintiff's agreement not to use real property for an "adult use" was entitled to absolute immunity); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, (10th Cir. 1991) (prosecutors who allegedly violated plaintiff's constitutional rights by threatening to file criminal charges unless plaintiff stopped practicing medicine entitled to absolute immunity); *Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991) (prosecutor who violated constitutional rights by compelling plaintiff to resign from employment in order to avoid a perjury charge entitled to absolute immunity); *McGruder v. Necaise*, 733 F.2d 1146 (5th Cir. 1984) (prosecutors who allegedly violated plaintiff's constitutional right to free and equal access to the courts by threatening to pursue criminal charges unless plaintiff dismissed civil action was entitled to absolute immunity).

Prosecutor D'Amelia's decision to forego prosecution was also in the nature of a plea bargain warranting absolute immunity. The dismissal of the criminal charges depended upon

a condition which required that Doe give a statement under oath concerning her innocence of the criminal charges pending against her. The willingness of the complainants to cooperate further in the criminal proceedings, particularly the alleged victim of the sexual abuse, depended upon that statement being made in their family church. Eliciting statements under oath from a willing suspect represented by counsel in a pending criminal matter is not an activity foreign to the office of a prosecutor. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)(actions undertaken by a prosecutor in preparing for the initiation of judicial proceedings are entitled to absolute immunity).

Although D'Amelia's conduct may have been misguided or inappropriate, it occurred in the course of his role as an advocate for the state. As such, D'Amelia should be granted absolute immunity.

C. The Alleged "Religious Act" Had A Proper, Secular Prosecutorial Purpose

The Second Circuit opinion is based on the proposition that Prosecutor D'Amelia had no authority under the Establishment Clause of the First Amendment to require a defendant to perform a "religious act" in order to have criminal charges dismissed. (A-11). As pointed out by Justice Jacobs, however, "to characterize Doe's oath as a 'religious act' begs the question of whether the act had a secular, prosecutorial purpose." (A-19). Clearly, it did.

The prosecutorial purpose served by eliciting the oath was to ascertain whether or not Doe committed the crime and, ultimately, to determine whether or not the complainants would cooperate in the prosecution. The Second Circuit's summary rejection of Prosecutor D'Amelia's position that the oath was analogous to the routine swearing of witnesses in judicial proceedings (because they are normally conducted in a nonreligious setting) is too simplistic.

Although it is true that a witness in federal court may opt to affirm testimony by using a nonreligious affirmation, the

affiant may also choose to swear on a bible using the words "so help me God." *See* Fed. R. Civ. P. 43(d); Fed. R. Evid. 603. The fact that a witness chooses this oath over another does not, in and of itself, convert it into a "religious act." Nor does the fact that the oath was performed in a church convert the oath into a "religious act."

Indeed, the Second Circuit very recently denied a habeas petition filed by a defendant contending that his murder trial was conducted in a Catholic Church hall which contained numerous religious artifacts, including a crucifix. *Knapp v. Leonardo*, 46 F.3d 170 (2d Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995). In so doing, the Second Circuit emphasized that, although it was "undoubtedly imprudent" to conduct the trial in the Church hall, "even traditional courtrooms are not devoid of religious symbols and artifacts and both jurors and witnesses are traditionally sworn with the phrase 'so help you God.'" *Id.* at 177, *quoting People v. Knapp*, 113 A.D.2d 154, 159, 495 N.Y.S.2d 985, 989 (3d Dept. 1985), *cert. denied*, 479 U.S. 844, 107 S. Ct. 158, 93 L. Ed. 2d 97 (1986).

Prosecutor D'Amelia may have been "undoubtedly imprudent" to allow the oath to be conducted in Jane Doe's family church. However, there is not even a hint that Prosecutor D'Amelia was attempting in any way to proselytize, or impose upon the Respondent a particular religion. To the contrary, the oath was taken in Doe's own church at the suggestion of her son, the alleged victim, and her estranged spouse. There is no indication whatsoever that Prosecutor D'Amelia possessed or expressed any preference with respect to the nature of the oath, or the location in which it was administered.

The oath, itself, recited only after extensive consultation with her attorney should not be viewed as a "religious act" devoid of a secular prosecutorial purpose. However, even if the act is deemed to be religious, it should not be treated differently from violations of other constitutional guarantees

which have been found to be worthy of absolute immunity when conducted in the role and function of a prosecutor.

The Second Circuit emphasizes the obvious to support its conclusion that absolute immunity does not attach under the circumstances: A governmental official has no authority under the First Amendment to require a religious act. (A-11). It does not explain, however, why the Establishment Clause should be elevated, or treated differently in the context of absolute immunity than other constitutional rights guaranteed by: the First Amendment (*see e.g., Mendenhall v. Goldsmith*, 59 F.3d 685 (7th Circuit), *cert. denied*, __ U.S. ___, 116 S. Ct. 568, 133 L. Ed. 2d 492 (1995)); Fourth Amendment (see *e.g., Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1268 (8th Cir. 1996); *Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991); *Mendenhall, supra*); Fifth Amendment (*see e.g., Pinaud, supra*; *Mendenhall, supra*; *Arnold, supra)*; Sixth Amendment (*see e.g., Pinaud, supra*); or Eighth Amendment (*see e.g., Pinaud, supra*).

Prosecutors who have violated these constitutional rights while performing their prosecutorial duties have been accorded absolute immunity. The words quoted by Justice Powell from Judge Learned Hand bear repeating:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest [or inexperienced] officers than to subject those who try to do their duty to the constant dread of retaliation.

Imbler v. Pachtman, 424 U.S. at 427, *quoting Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

Prosecutor D'Amelia should be similarly protected.

VI. Conclusion

For all of the foregoing reasons, Petitioner respectfully requests this Petition be granted so that briefs may be submitted addressing more fully the merits of the important issues raised.

Dated: November 22, 1996
Goshen, New York

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 870 — August Term, 1995

(Argued: January 19, 1996 Decided: April 22, 1996)

Docket No. 95-7659

JANE DOE,

Plaintiff-Appellee,

– v. –

FRANCIS D. PHILLIPS, II,

Defendant,

GERALD D. D'AMELIA, JR.,

Defendant-Appellant.

KEARSE, JACOBS, and HEANEY*,

Circuit Judges.

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* Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge*, denying prosecutor's motion for summary judgment based on absolute and qualified immunity defenses against First Amendment claim that prosecutor refused to dismiss criminal charges against plaintiff unless she swore to her innocence in a religious ceremony.

Judge Jacobs dissents in a separate opinion.

Affirmed.

ROBERT N. ISSEKS, Middletown, New York (Alex Smith, Middletown, New York, on the brief), *for Plaintiff-Appellee.*

PHYLLIS A. INGRAM, Nyack, New York (Harold Y. MacCartney, Jr., J. David MacCartney, Jr., MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, New York, on the brief), *for Defendant-Appellant.*

KEARSE, *Circuit Judge*:

Defendant Gerald D. D'Amelia, Jr., an assistant district attorney for Orange County, New York, appeals from an order of the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge*, denying his motion to dismiss the complaint of plaintiff Jane Doe, brought under 42 U.S.C. § 1983 (1994) for damages and declaratory relief on the ground that D'Amelia violated Doe's First Amendment rights by refusing to dismiss certain criminal charges against her unless she swore to her innocence on a bible in church. On appeal, D'Amelia contends principally that the district court should have granted his motion for summary judgment based on his defenses of absolute prosecutorial immunity and qualified immunity. For the reasons that follow, we affirm the order of the district court.

I. BACKGROUND

The facts relevant to this appeal do not appear to be in dispute. Doe and her estranged husband ("John Doe") have two sons. In October 1992, the older son, Nicholas, then age 14, lodged an official complaint, at the urging of his father, accusing Doe of engaging in acts of oral sex and sexual intercourse with Nicholas in September and October of that year. Doe was arrested in October 1992 and was charged with felony rape in the third degree, felony sodomy in the third degree, and the misdemeanor of endangering the welfare of a child. The case was assigned to D'Amelia.

After having several conversations with Nicholas and more than a dozen with John Doe, D'Amelia began, for several reasons, to doubt the reliability of the accusations. First, as to Nicholas's accounts of the abuse, D'Amelia "was concerned with some of the inconsistencies." (Deposition of Gerald D. D'Amelia, Jr. ("D'Amelia Dep.") at 20.) Another assistant district attorney who attended at least one of D'Amelia's interviews with Nicholas had even greater doubts than D'Amelia about Nicholas's credibility. (D'Amelia Dep. at 19-20.) In April 1993, D'Amelia filed a prosecutor's information, reducing the felony charges against Doe to misdemeanor counts of sexual abuse, all on dates different from the dates originally specified by Nicholas.

Second, D'Amelia had doubts about the credibility of John Doe with respect to the allegations of sexual abuse because, *inter alia*, John Doe "claimed that he was able to tell what was going to happen in the future sometimes through his dreams," and claimed that the FBI would verify that ability. (D'Amelia Dep. at 16.) D'Amelia was unable to locate the FBI agent named by John Doe and had "doubts about people predicting the future through dreams." (D'Amelia Dep. at 17.) D'Amelia also doubted John Doe's veracity because John Doe himself claimed to have witnessed one instance of Doe's alleged sexual abuse of Nicholas but had not contemporaneously complained. (*Id.*)

Further, D'Amelia stated that Nicholas himself "did not make an immediate [complaint] after the alleged abuse nor were his allegations volunteered. Rather, the child's allegations against his mother were made only after his father had had 'visions' that the child had been sexually abused by the mother"; and Nicholas's allegations were made only after "[t]he father had prodded his son in a car and in church for a total of about three hours." (D'Amelia unpaginated affidavit dated June 9, 1995 ("D'Amelia Aff."), Joint Appendix ("JA") 137.)

Doe maintained her innocence throughout. A Department of Social Services case worker conducted an investigation of the sexual abuse charges and attempted to determine whether or not the allegations were truthful. The social worker declined to validate the allegations. D'Amelia began to lack confidence that the charges against Doe could be proven beyond a reasonable doubt. (D'Amelia Dep. at 44.)

Toward the end of April 1993, John Doe proposed to D'Amelia that the charges be dismissed if Doe, a member of the congregation of a local Roman Catholic church (the "Church"), would place her hand on a bible in the Church and swear that she had not sexually abused her son. Threatening that he would not cooperate in the prosecution, John Doe stated "that he preferred that the matter be resolved by the law of God rather than the law of man." (D'Amelia Aff., JA 137.)

After consulting with several other assistant district attorneys, D'Amelia communicated this proposition to Doe's attorney. Doe, who continued to deny the charges against her, agreed to appear at the Church on May 7, 1993, because she wanted to have the criminal proceedings concluded. D'Amelia testified, however, that when they reached the Church on the morning of May 7, Doe's attorney indicated that Doe had

> some reluctance to go through with what we had planned.
>
> Q. And what you had planned was—

> A. To have [Doe] deny the allegations by swearing on the bible that she never had any sexual contact with her son.
>
> Q. In the church, correct?
>
> A. Yes, in the church.

(D'Amelia Dep. at 55.) D'Amelia testified that he told counsel that Doe did not have to go through with this process, but that if she did not, the criminal charges against her would not be dismissed that day. Further, D'Amelia gave no indication that if Doe did not proceed to swear to her innocence on a bible in the Church, the charges would be dismissed at some subsequent time (D'Amelia Dep. at 53); rather, without discussing any other possibilities, D'Amelia suggested that "if this didn't happen on that day," Doe would be "going to trial where she may have been convicted or acquitted" (D'Amelia Dep. at 59).

Following this exchange, Doe and D'Amelia entered the Church and, in a small chapel area, proceeded with the ceremony. Also present were Doe's attorney, an investigator from the district attorney's office, John Doe, Nicholas, Doe's other son, who was three years younger than Nicholas, Doe's mother and sister, the Monsignor of the Church, and perhaps the assistant pastor as well. With D'Amelia holding the bible and reciting the oath that Doe was to repeat,

> [p]laintiff then placed her hand on [the] Bible and stated: "I, Jane Doe, swear on this Bible that I did not have any form of sexual contact with my son Nicholas on any occasion, so help me God,"

(D'Amelia Aff, JA 139).

Immediately thereafter, D'Amelia went to the local court in which the criminal charges were pending and had the charges dismissed. John Doe and Nicholas signed written forms consenting to the dismissal in consideration for Doe's oath in the Church; the forms stated that John Doe and Nicholas had "put [their] trust in the law of God, rather than the laws of man."

In September 1993, Doe commenced the present action against D'Amelia and Orange County District Attorney Francis D. Phillips II, alleging, *inter alia*, that D'Amelia's conduct constituted a coerced religious practice in violation of the Establishment Clause of the First Amendment, and seeking damages and a declaratory judgment. The claim against Phillips was later withdrawn in light of evidence that he had had no personal involvement in the pertinent events.

Following discovery, D'Amelia moved to dismiss the claim against him for failure to state a claim on which relief could be granted, contending that Doe had voluntarily entered into the bargain for dismissal of the criminal charges in exchange for swearing to her innocence in the Church and hence could not claim that she had been coerced in violation of her constitutional rights. He moved alternatively for summary judgment, contending (a) that making the agreement for dismissal of the charges was a prosecutorial function, and he was thus entitled to absolute immunity, and (b) that since he had acted in good faith and believed after consultation with several of his colleagues that there was no problem in conditioning dismissal on a church ceremony, he was entitled to at least qualified immunity.

In a June 30, 1995 ruling from the bench, the district court denied D'Amelia's motions. Noting that it was "highly doubtful if a trier of fact could truly find voluntariness" in Doe's participation in the Church ceremony (Hearing Transcript, June 30, 1995 ("Tr."), 25), the court ruled that that question remained for trial on the merits of Doe's claim. The court denied D'Amelia's motion for summary judgment because it concluded as a matter of law that, on the facts before it, D'Amelia was not entitled to either absolute or qualified immunity.

The court rejected the claim of absolute immunity, reasoning that the compulsion of participation in a religious ceremony is not a prosecutorial function and is beyond a prosecutor's jurisdiction. The court noted that

> as a matter of law ... the procedure [conducted by D'Amelia] was, in fact, religious, as it occurred in a Roman Catholic church by the direction of the prosecutor and the plaintiff was required to swear her innocence on the Bible pursuant to a[n] oath ending with the words: so help me God.
>
> During the ceremony the pastor or priest was allegedly present standing in the back of the church and another clergyman may also have been present.

Tr. 21. The court stated that

> as a matter of law ... a prosecutor does not have "any colorable claim of authority" ... to threaten continued prosecution of criminal charges unless a defendant submits to a prescribed religious ceremony to substantiate her contention that she's innocent.

Tr. 20.

The district court also rejected D'Amelia's theory that he was entitled to qualified immunity on the basis of his consultation with several other assistant district attorneys in his office, none of whom saw the proposed ceremony as an inappropriate condition. Noting that "in a wide range of contexts the Supreme Court has consistently prohibited government coercion of religious actions and speech, particularly speech in connection with religious belief," Tr. 23, the district court concluded that "any reasonable person, particularly any reasonable prosecutor trained as a lawyer, would be fully aware of the right of a citizen to be free from governmental coercion of religious exercise," Tr. 22-23. Thus, while Doe had not been able to point to a case similar to the present one, the court reasoned that it was "absolutely clear on this record that the allegedly compelled speech in this case was religious, and ... that no reasonable official could believe for one moment that forcing an individual to engage in a religious ceremony in a church comports with the First Amendment." Tr. 24.

D'Amelia's motion for summary judgment was thus denied, and this appeal followed. *See generally Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (district court's denial of a defense of qualified immunity, to the extent that it turns on an issue of law, is immediately appealable); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (same re absolute immunity).

II. DISCUSSION

On appeal, D'Amelia contends that the district court misapplied the standards governing absolute and qualified immunity. We disagree.

A. *Absolute Immunity*

In support of his defense of absolute immunity, D'Amelia argues principally that the dismissal of the charges against Doe in exchange for her participation in church proceedings fell squarely within the scope of his prosecutorial duties. We disagree.

It is of course well established that, although § 1983 does not on its face preserve traditional common-law immunities, "Congress did not intend § 1983 to abrogate immunities well grounded in history and reason." *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2612-13 (1993) (internal quotation marks omitted). These traditional common-law immunities include a prosecutor's absolute immunity from claims for damages arising out of prosecutorial duties that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). While absolute immunity may "leave the genuinely wronged ... without civil redress against a prosecutor whose malicious or dishonest action" has deprived them of their constitutional rights, *Imbler*, 424 U.S. at 427, considerations such as the need "to preserve the integrity of the judicial process" and to allow "a public prosecutor ... zealously [to] perform the prosecutorial duties of the office," *Hill v. City of New York*, 45 F.3d 653, 656 (2d Cir. 1995), require that the prosecutor be shielded from liability for damages with respect to acts performed

within the scope of his duties when pursuing a criminal prosecution.

In determining whether a prosecutor enjoys absolute immunity against any particular claim for damages, the courts are to apply a "functional approach," examining "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 113 S. Ct. at 2613 (internal quotation marks omitted). Thus, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Id.* at 2615. We are to inquire whether those actions are part of a prosecutor's traditional functions, *see, e.g., Pinaud v. County of Suffolk*, 52 F.3d 1139, 1147-48 (2d Cir. 1995); *Hill v. City of New York*, 45 F.3d at 661-62, and "whether [they] are closely associated with the judicial process," *Burns v. Reed*, 500 U.S. 478, 495 (1991). The ultimate "question ... is whether the prosecutors have carried their burden of establishing that they were functioning as 'advocates' when they" engaged in the challenged conduct. *Buckley v. Fitzsimmons*, 113 S. Ct. at 2616. If the challenged conduct either is not a traditional function of a prosecutor, *see, e.g., id.* at 2617-18 (holding press conference not a prosecutorial function), or is not part of his adversarial function, *see, e.g., Burns v. Reed*, 500 U.S. at 495-96 (for example, advising police on permissibility of investigatory method), the prosecutor is not entitled to absolute immunity. An official also has no absolute immunity when he has acted in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (internal quotation marks omitted).

Within this framework, a prosecutor has absolute immunity from a claim for damages for commencing a prosecution, *see, e.g., Imbler v. Pachtman*, 424 U.S. at 431 (prosecutor absolutely immune from damages for "initiating a prosecution"); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987) (absolute immunity extends to filing criminal information and procuring arrest warrant), as well as for his performance of tasks as an advocate in the conduct of the prosecution, *see, e.g., Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (prosecutor absolutely immune from liability on damages claim that he conspired to

present false evidence at criminal trial). Further, since the prosecution-initiation decision with respect to any given charge is an either-or proposition, we have recognized that a prosecutor will be absolutely immune from a claim for damages for a decision not to prosecute. *See, e.g., Schloss v. Bouse*, 876 F.2d 287, 290-91 (2d Cir. 1989) (discussed below); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 531 (2d Cir. 1993) (prosecutor absolutely immune for deciding not to institute criminal proceeding and thus advising police not to arrest suspect on charges).

Using the required functional approach, we have also recognized that absolute immunity extends to a prosecutor's agreement to forgo prosecution in exchange for certain types of concessions by the accused. In *Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981), for example, the plaintiff brought a suit for damages on the ground that in a prior criminal proceeding the prosecutor had misrepresented facts to him, inducing him to plead guilty to certain charges; we ruled that the prosecutor had absolute immunity because his conduct involved plea bargaining, a prosecutorial function. In *Schloss v. Bouse*, 876 F.2d at 292-93, the plaintiffs sought damages because a prosecutor required them, following their arrest, to execute releases in favor of various municipal entities in order to obtain his agreement not to prosecute. Noting that "the demand for releases and the threat to prosecute were interdependent," *id.* at 291, we concluded that the prosecutor must be understood to have made a prosecutorial decision, albeit a conditional one, and that the demand for the releases was akin to a plea bargain. We held that absolute immunity attached to his actions, regardless of his motivation in securing the releases, because the negotiation of a plea bargain is an act within a prosecutor's jurisdiction as a judicial officer.

In so concluding, however, we emphasized that "we [we]re not confronted with a demand that [wa]s foreign to the prosecutor's office," *id.* at 292, and we expressly rejected any notion

> that the prosecutor may with impunity couple a threat of prosecution with all manner of demands, for example, demands for bribes or sexual favors. A government official does not have absolute immunity for acts that are "manifestly or palpably beyond his authority," ... or performed in the "'clear absence of all jurisdiction,'"

id. at 291. We stated that, in order to determine whether a prosecutor has lost his shield of absolute immunity by making his prosecutorial decision conditional on the suspect's performing a demanded act, a court is to look to "the nature of the conduct that was allegedly intertwined with the prosecutorial decision ... and deny absolute immunity if the demand was plainly beyond the prosecutor's jurisdiction." *Id.* at 291-92. If the prosecutor has acted "'without any colorable claim of authority'" to impose the condition in question, *id.* at 291 (quoting *Barr v. Abrams*, 810 F.2d at 361), his conduct is not protected by absolute immunity.

In the present case, the intertwined conduct was the demand for a religious oath on a bible in a church. It is well settled that a government official has no authority to require a religious act, for the Establishment Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment, *see McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948), provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I. Under the First Amendment, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to ... participate in religion or its exercise...." *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992).

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice

> committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Id. at 2656. *See also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." (footnote omitted)); *see generally Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (Establishment Clause prohibits, *inter alia*, "an excessive government entanglement with religion" (internal quotation marks omitted)).

Under these standards, the district court correctly ruled, given the undisputed facts and the facts to which D'Amelia himself attested, that D'Amelia's conduct was not protected by absolute immunity because his demand that Doe swear to her innocence on a bible in church was manifestly beyond his authority. We reject D'Amelia's contention that the May 7, 1993 ceremony to which Doe was subjected was analogous to the swearing of witnesses in judicial proceedings. In the latter, a witness's oath is recited in the presence of a secular authority in a generally nonreligious setting. Further, in a federal judicial proceeding, the witness always has the option of giving a nonreligious affirmation of her commitment to tell the truth rather than swearing on a bible or to a divine Being. *See, e.g.*, Fed. R. Civ. P. 43(d) (permitting affirmation instead of oath); Fed. R. Evid. 603 (same); Fed. R. Crim. P. 6(c) (giving grand jury foreperson power to administer oaths "and affirmations"); 28 U.S.C. § 1746 (1994) (generally permitting affirmations instead of oaths under federal law).

In contrast, it is plain that the May 7 swearing conducted by D'Amelia was a religious event. The proceeding took place in a church, with at least one priest present. D'Amelia required Doe to place her hand on a bible. And the oath, whose content was devised by D'Amelia, and which he required Doe to repeat after him, ended with the phrase "so help

me God." The district court correctly ruled that in so doing, D'Amelia performed acts that not only are patently forbidden of government officials by the Constitution but also are distinctly outside the realm of a prosecutor.

The religious nature of the act demanded of Doe was emphasized by the impetus for the ceremony. John Doe informed D'Amelia that John Doe preferred to have the charges against Doe "resolved by the law of God rather than the law of man." (D'Amelia Aff., JA 137.) And in consenting to the dismissal of the charges, John Doe and Nicholas signed consent forms that stated that they had "put [their] trust in the law of God, rather than the laws of man." The district court properly ruled that D'Amelia had no colorable claim of jurisdiction *qua* prosecutor to enforce the laws not of man but of God.

B. *Qualified Immunity*

In support of his defense of qualified immunity, D'Amelia argues, *inter alia*, that he did not violate any clearly established constitutional rights because he and his colleagues knew of no case holding that requiring an accused to swear to her innocence on a bible in church was impermissible. We reject his contentions substantially for the reasons stated by the district court.

Government officials may enjoy a privilege of qualified immunity from liability for damages arising out of their performance of discretionary official functions so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Ying Jing Gan v. City of New York*, 996 F.2d at 532-33. In order to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). To determine whether a right was clearly defined at the time the defendant acted, a court should consider:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Ying Jing Gan v. City of New York, 996 F.2d at 532 (internal quotation marks omitted).

The right of an individual not to be forced to participate in a religious ceremony was clearly established, as is demonstrated by the authorities discussed in Part II.A. above. The district court correctly ruled that that right was so well established that "any reasonable person, particularly any reasonable prosecutor trained as a lawyer, would be fully aware of the right of a citizen to be free from governmental coercion of religious exercise," Tr. 22-23; that it was "absolutely clear on this record that the allegedly compelled speech in this case was religious[;] and ... that no reasonable official could believe for one moment that forcing an individual to engage in a religious ceremony in a church comports with the First Amendment," Tr. 24.

Though D'Amelia contends that Doe was not in fact "forced" to swear to her innocence in the Church, and that she did so of her own volition, we, like the district court, are skeptical in light of D'Amelia's own deposition testimony. Even a "subtle coercive pressure" by a government official to engage in religious activity may violate the First Amendment, *see Lee v. Weisman*, 112 S.Ct. at 2658, and D'Amelia's testimony reveals that the only alternatives he offered Doe were to swear on a bible in the Church or to have the criminal charges go to trial.

In any event, the question of whether Doe's submission to the religious ceremony was voluntary goes to the merits of her claim, not to D'Amelia's entitlement to immunity. The ultimate resolution of the voluntariness issue remains for the jury as trier of fact.

CONCLUSION

We have considered all of D'Amelia's arguments on this appeal and have found them to be without merit. The order of the district court denying his motion for summary judgment dismissing the complaint on immunity grounds is affirmed.

JACOBS, *Circuit Judge*, concurring in part, dissenting in part:

I concur in the majority's discussion of qualified immunity in Part II.B of the opinion, but I respectfully dissent from the majority's decision in Part II.A to deny absolute immunity.

I agree with the majority that, in determining whether a prosecutor is entitled to absolute immunity, we must take a "functional approach" that examines whether the prosecutor's actions were "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Commencing a prosecution is one such prosecutorial function, *id.* at 424-25, and, "as a matter of logic, absolute immunity must also protect the prosecutor from damages suits based on his decision *not* to prosecute." *Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989). I recognize that absolute immunity does not extend to a prosecutor who, as a condition of dismissing charges, makes a demand on the defendant that "is foreign to the prosecutor's office." *Id.* at 292. The majority holds that the condition imposed here by D'Amelia—that Doe swear her innocence on a Bible in a church—is unprotected under the governing standards because it was "manifestly or palpably beyond his authority," *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), or performed in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (internal quotation marks and citation omitted). I dissent from that holding because D'Amelia's demand (i) was intertwined with a prosecutorial decision (to prosecute or not) and (ii) entailed an act (the eliciting of a statement under oath on the subject of the prosecution) that was within D'Amelia's role and jurisdiction as a prosecutor. This is demonstrably

sufficient to insulate D'Amelia from civil liability under the authorities that apply the doctrine of absolute immunity.

Whether a prosecutor's act is "foreign to the prosecutor's office" does not depend on the reprehensible, unethical or inappropriate elements of that act—even if that act allegedly violates the plaintiff's constitutional rights. Rather, "absolute immunity extends to those acts, whether in or out of the courtroom, 'which occur in the course of [the prosecutors's] role as an advocate for the State.'" *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1148 (2d Cir. 1995) (quoting *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993)). A prosecutor's wrongful act, such as participating in a conspiracy to manufacture evidence, "is certainly not something that is *properly* within the role of a prosecutor," but that "is immaterial, because [the] immunity attaches to his function, not to the manner in which he performed it." *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (internal quotation marks and citation omitted). The absolute character of absolute immunity is that it "protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate." *Dory*, 25 F.3d at 83. In short, absolute immunity insulates prosecutorial misconduct—however outrageous—so long as the misconduct is *prosecutorial*.

We have taken the functional approach to the issue of immunity in various contexts. In *Dory*, a prosecutor who allegedly participated in a conspiracy to present false evidence at trial was held to be absolutely immune, 25 F.3d at 83, because the "professional evaluation of the evidence ... and appropriate preparation for its presentation at trial" are prosecutorial acts. *Buckley*, 113 S. Ct. at 2615. *See also Brodnicki v. City of Omaha*, 75 F.3d 1261, 1267 (8th Cir. 1996) (prosecutor who allegedly violated plaintiff's right to due process by examining evidence prior to trial and discussing charges with defense counsel was entitled to absolute immunity). Similarly, in *Pinaud* we granted absolute immunity to prosecutors who allegedly violated the plaintiff's rights under the Fourth, Fifth, Sixth and Eighth Amendments by: seeking improperly to increase the plaintiff's bail; making false representations to

prompt a plea agreement, and then breaching that agreement; manufacturing a bail jumping charge; making misrepresentations to the Bureau of Prisons; and unnecessarily transferring the plaintiff from county to state jail. 52 F.3d at 1149. All of these alleged acts, while unethical, deviant, and violative of the plaintiffs' constitutional rights, were "components of the initiation and presentation of a prosecution, and therefore ... protected by absolute immunity." *Id.*

Courts allow absolute immunity even where the prosecutor allows the decision to prosecute to depend on conduct by the defendant that is, strictly speaking, not the prosecutor's business. In *Schloss*, the decision to forgo prosecution was made to depend upon the putative defendants' release from liability of the municipalities and police officers who allegedly arrested and detained them in violation of their constitutional rights. 876 F.2d at 289. We held that the prosecutor was entitled to absolute immunity because the demand on which the decision to prosecute depended was in the nature of a plea bargain, and plea bargains are not foreign to the office of a prosecutor. *Id.* at 291. *See also Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981) ("a prosecutor's activities in the plea bargaining context merit the protection of absolute immunity"). Other circuits have granted absolute immunity to prosecutors in similar cases. *See Mendenhall v. Goldsmith*, 59 F.3d 685, 691 (7th Cir.) (prosecutor allegedly violated plaintiff's First, Fourth and Fifth Amendment rights by conditioning dismissal of civil forfeiture action upon plaintiff's agreement not to use real property for an "adult use"), *cert. denied*, 116 S. Ct. 568 (1995); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1492 (10th Cir. 1991) (prosecutors allegedly violated plaintiff's constitutional rights by threatening to file criminal charges against plaintiff unless he stopped practicing medicine); *Arnold v. McClain*, 926 F.2d 963, 967 (10th Cir. 1991) (prosecutor allegedly violated plaintiff's Fourth and Fifth Amendment rights by compelling him to resign from job to avoid a perjury charge); *McGruder v. Necaise*, 733 F.2d 1146, 1147-48 (5th Cir. 1984) (prosecutors allegedly violated plaintiff's right to "'free and equal' access to the courts" by threatening to pursue criminal charges unless

plaintiff dismissed civil action). In each of these cases, the alleged bad act was a perversion of the prosecutorial role; but each prosecutor was entitled to absolute immunity from civil liability because the role itself was prosecutorial. D'Amelia (whose conduct was in no way corrupt or immoral) should be protected in the same way for the same reason.

As in *Schloss*, D'Amelia's decision to forgo prosecution was made to depend upon a condition. That condition required Doe to give a statement under oath. The statement concerned the criminal charges then pending. The willingness of the complainants to cooperate further in the criminal proceedings depended on that statement. Eliciting such statements from a willing suspect in a pending criminal matter is not an activity foreign to the office of a prosecutor. *See Buckley*, 113 S. Ct. at 2615 ("acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial" are entitled to absolute immunity). That is because "[p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence," *Imbler*, 424 U.S. at 431 n. 33, including statements made by witnesses or alleged perpetrators. Therefore, in my view, we must grant D'Amelia absolute immunity because his conduct, while inappropriate, "occur[red] in the course of his role as an advocate for the State." *Buckley*, 113 S. Ct. at 2615.

The majority opinion focuses on the impropriety of the prosecutor's conduct rather than on whether that improper conduct was intertwined with a prosecutorial function. The majority thus poses a question to which there can be one answer: Is compelling a defendant to participate in a "religious ceremony" a prosecutorial function? That inquiry, however, conflates a generic function of a prosecutor (taking a statement under oath) with the aspect of that conduct which is alleged to be unconstitutional (taking that statement in a church, on a Bible, etc.). That is not the approach we have employed in previous cases. In *Dory*, we did not ask whether suborning perjury was "*properly* within the role of a prosecutor"; we held that that inquiry was "immaterial." 25 F.3d at 83. In

Pinaud, we did not ask whether it was a prosecutorial function to dissemble and confect false charges. And in *Schloss*, we did not ask whether procuring releases from civil liability was a prosecutorial act. In each of these cases, we asked whether the underlying conduct was related to the prosecutorial function—and granted absolute immunity if it was, whether or not the misconduct was egregious. By focusing on the nature of the misconduct in this case, the majority opinion erroneously qualifies absolute immunity.[1]

Although prosecutors may set conditions for ending a prosecution—and enjoy absolute immunity in so doing—I agree with the majority that this freedom has its limits. Under *Schloss*, we determine those limits by looking to the "nature of the conduct that was allegedly intertwined" with the decision to prosecute or not, "and deny absolute immunity if the demand was plainly beyond the prosecutor's jurisdiction," *Schloss*, 876 F.2d at 291-92, or was "manifestly and palpably beyond his authority." *Spalding*, 161 U.S. at 498. *Schloss* gives examples of misconduct that would be unsheltered by absolute immunity: a demand for a bribe or for sexual favors. 876 F.2d at 291. These acts of misconduct—which serve purely personal interests without an alloy of a public function—differ in kind from the misconduct that is protected by absolute immunity. There is a difference between performing one's office, however disgracefully, and offering to sell it for a purely personal benefit.[2]

---

[1] The majority opinion emphasizes that the oath in church is the subject of "undisputed facts ... to which D'Amelia himself attested...." Maj. Op. at [14]. But this makes no difference. Whether D'Amelia has attested to the act in question or not, we are bound to assume it at the summary judgment stage, as we do in other cases, because we look at the plaintiff's allegations in a light most favorable to her; but we should not strip D'Amelia of absolute immunity because he attests to what we would otherwise be bound to assume.

[2] A prosecutor who used his office to proselytize a particular religion could be viewed as obtaining a purely personal benefit. Here, however, the oath was taken in Doe's own church, at the suggestion of her spouse

(Footnote continued)

The majority rests its decision on the proposition that a government prosecutor "has no authority to require a religious act." Maj. Op. at [13]. Under the Establishment Clause of the First Amendment, that is undoubtedly true. However, to characterize Doe's oath as a "religious act" begs the question of whether the act had a secular, prosecutorial purpose. The prosecutorial purpose here was to ascertain whether Doe committed the crime and whether the complainants would cooperate in the prosecution. In aid of that purpose, D'Amelia asked Doe to recite, "I, Jane Doe, swear on this Bible that I did not have any form of sexual contact with my son Nicholas on any occasion, so help me God." Similar statements are taken every day in federal and state courtrooms. As the majority stresses, a witness in federal court now has the option of averring as to the veracity of her testimony by a nonreligious affirmation. *See* Fed. R. Civ. P. 43(d); Fed. R. Evid. 603. But, conversely, an affiant may choose to swear on a Bible, and may end with the words "so help me God." The essence and definition of any oath is the invocation of God as witness. While that invocation inspires awe, a witness's oath is not thereby converted into a "religious act" or ritual that subsumes the secular purpose of the proceedings.

Naturally, religious feeling is heightened when an oath is taken in a church; but that does not keep the oath from serving the secular, prosecutorial function it fulfills in other settings. In *Knapp v. Leonardo*, 46 F.3d 170, 177 (2d Cir.), *cert. denied*, 115 S. Ct. 2566 (1995), we affirmed the denial of a habeas petition filed by a defendant whose murder trial was conducted in a Catholic church hall while the Otsego County Courthouse was under repair. As the dissent pointed out, the premises contained "'holy pictures' and other religious artifacts, including but not necessarily limited to a crucifix along the path from the makeshift courtroom to the jury room." *Id.* at 181 (Oakes, *J.*, dissenting). Although this Court emphasized that "it was undoubtedly imprudent" to conduct the trial

---

and son, and there is no indication that D'Amelia had or expressed the slightest sectarian preference.

there, we quoted the view of the state appellate court that "[e]ven traditional courtrooms are not devoid of religious symbols and artifacts and both jurors and witnesses are traditionally sworn with the phrase 'so help you God.'" *Id.* at 177 (quoting *People v. Knapp*, 113 A.D.2d 154, 159, 495 N.Y.S.2d 985, 989 (3d Dep't 1985), *cert. denied*, 479 U.S. 844 (1986)).

As the majority opinion points out, John and Nicholas Doe stated that they preferred to "put [their] trust in the law of God, rather than the laws of man" when they promised that they would not testify against Doe if she took the oath. Although the Establishment Clause prohibits government officials from compelling citizens to participate in religious exercises, I cannot agree with the majority that D'Amelia, in asking Doe to take the oath in the church, undertook to enforce "the laws not of man but of God" (a locution that may suggest there is no overlap). Maj. Op. at [16]. D'Amelia performed his prosecutorial role in an unusual manner, faced as he was by strange circumstances: a criminal charge that is difficult to corroborate; a domestic dispute, in which deference (often excessive deference) is given to the willingness of family members to cooperate; and complainants who were willing to withdraw a possibly delusional charge if their wife and mother took an oath in the family's church. D'Amelia had reason to think that that oath would fully serve the interests of the complainants, the defendant, the community and the prosecutorial office. As to Doe, D'Amelia's conduct spared her the kind of ordeal and humiliation that persons unjustly accused of child molestation routinely endure, and from which acquittal is often an ineffective deliverance. Because I believe that D'Amelia's actions were entwined with his functions as a prosecutor, I would hold that he is entitled to absolute immunity.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JANE DOE,

Plaintiff,

– against –

93 Civ. 6333 (CLB)

FRANCIS D. PHILLIPS and
GERALD D. D'AMELIA, JR.,

Defendants.

----------x

United States Courthouse
White Plains, New York

June 30, 1995
10:00 o'clock a.m.

Before:

HON. CHARLES L. BRIEANT,
District Court Judge

APPEARANCES:

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BY: REGINALD RUTISHAUSER, Esq., Of Counsel

Court Reporter: ANGELA A. O'DONNELL, RPR

Proceedings recorded by mechanical stenography, transcript produced by C.A.T.

TRANSCRIPT OF PROCEEDINGS DELETED FOR BREVITY

* * *

THE COURT: The Court's decision is as follows:

Under the pseudonym of Jane Doe, the plaintiff commenced this action pursuant to Title 42 of the United State Code, Section 1983, alleging her rights under the First and Fourteenth Amendments of the United States Constitution were violated when the defendant, Gerald D. D'Amelia, Jr., who is Assistant District Attorney of the County of Orange forced her under the threat of continued criminal prosecution to participate in a religious ceremony as a condition to dismissal of criminal charges.

The District Attorney of Orange County was originally a named defendant in this case, but the action has been discontinued as to him because it's understood there is no evidence he had prior knowledge of what was being done in the case.

The remaining defendant moves to dismiss or for summary judgment on the ground that he is entitled to both absolute and qualified immunities. And the Court treats the motion as for summary judgment. The burden on such a motion is on the moving party to establish there are no genuine issues of material fact or law that are in dispute and that he's entitled to judgment as a matter of law. And that the case can be resolved on the papers submitted.

That is the thrust of Rule 56(c) and that is the intent and meaning of *Anderson v. Liberty Lobby* in the Supreme Court in 1986 and *Matsushita Electric Industry against Zenith Radio*, and United States against Deibold, Inc., in 1962 in the Second Circuit. The law is in order to defeat a summary judgment motion the non-moving party need only present evidence from which a jury might return a verdict in its favor.

Now, according to the complaint as amplified in the motion, the plaintiff and her husband, who are the natural parents of their son, separated in 1988 as a result of a domestic

dispute. In 1992 the son, who was age 14 at that time, complained to members of a local police department in Orange County that on dates and at times specified the plaintiff had committed specific acts of sexual abuse and endangerment of the minor. These acts, if true, constituted felonies under state law. The plaintiff alleges that it was the intervention of the estranged husband which had induced or caused the son to make the statements or charges.

On October 25, 1992, based on the written complaint of the plaintiff's son, the plaintiff was arrested and charged with various felonies having to do with endangering the welfare of her son. The Department of Social Services case worker conducted an investigation of the sexual abuse charges and attempted to validate or not whether these allegations were believed to be truthful. And this professional social worker declined to validate the sex abuse allegations.

The Court doesn't place too much emphasis one way or another on this social service evaluation of sexual abuse charges, but it is a common practice to have an attempted evaluation done.

The plaintiff alleges and the Court assumes for purposes of the motion that either the police or the District Attorney's office had confirmed with the plaintiff's employer she was actually at work on at least some or all of the dates of alleged abuse and, therefore, had an alibi defense. The defendant, Assistant District Attorney D'Amelia, was assigned prosecution of the criminal case against the plaintiff.

On April 29, 1993, the prosecutor signed the prosecutor's information which charged that the plaintiff had committed 13 misdemeanor counts of sexual abuse which allegedly occurred on different dates. Apparently, the matter was not presented to the Grand Jury as a felony.

On April 30th, it is claimed by the plaintiff that Mr. D'Amelia informed the plaintiff and her attorney that the plaintiff's estranged husband had stated that he would consent to dismissal of the charges if the plaintiff would swear on a

Bible in a specified parish church before a named clergyman that she had not molested her son.

The plaintiff's attorney at that time, Ms. Strauss, sent to Mr. D'Amelia a letter dated May 7, 1993, which states in relevant part as follows:

"This is to confirm our conversation regarding the above matter. You have requested, based upon [and here the plaintiff's husband name appears in the original letter] urging that the plaintiff swear on the Bible in [a specified church] that she did not engage in any sexual abuse of her son.

You have stated that, upon her taking such action, you will dismiss with prejudice any and all charges of sexual abuse in, [the court is specified,] presently pending against the plaintiff].

It is my understanding that [plaintiff's husband] will be in the church at 2:30 p.m. on May 7, 1993, and that you have agreed to have a investigator or police officer present for the protection of [the plaintiff.]"

The Court believes that it makes no difference to the resolution of this motion whether the idea originated with the husband and was conveyed directly by him and the public official merely said he would acquiesce in it, or whether the idea originated with the defendant. Those matters can be developed at trial.

The defendant alleges and the plaintiff disputes that the plaintiff freely and voluntarily agreed to the proposal. It is very difficult for this Court to imagine how that kind of agreement can be deemed voluntary because, if you don't volunteer, it was made clear to her, or so she says, that the prosecution of the criminal charges would continue. So it is really hardly voluntary. But be that as it may, in the tradition of Henry of Navarre, the plaintiff here made herself available at the church at the time and place required.

The defendant asserts that this was discussed at length with the plaintiff and her attorney and it's argued today that the

attorney told the plaintiff to go ahead and do it, and I'm sure that's true. I think any practitioner serving the interests of his client would tell the client to do almost anything to avoid a criminal trial because particularly in the area of sex abuse, convictions do occur and there's never any sure outcome to any criminal trial, however innocent she might be.

So there was kind of a choice of alternatives here which, after reflection, and again weighing some of the similar considerations which motivated Henry of Navarre, she agreed to go through with this because the plaintiff wanted to dispose of the criminal charges.

According to the plaintiff, the proposal was always presented in the form of a prosecutorial ultimatum. The plaintiff either swears on a Bible in front of the priest in this designated church that she's innocent or the prosecution will continue. The plaintiff, of course, now says that she was extremely upset about being asked to perform such a religious act and that she did so against her will and under the coercion of being subject to have to go through a criminal trial and take the risk of conviction of a crime of which she now, of course, says she was innocent.

At the church, the plaintiff's attorney allegedly stated that the plaintiff was reluctant to go through with the ceremony.

On May 7, 1993, the plaintiff, her attorney and the defendant and a District Attorney's investigator and the plaintiff's mother and sister all met at the specified local church. While the plaintiff's husband and the children were kneeling inside the church, Mr. D'Amelia himself held the Bible and read from a prepared written statement and he had the plaintiff place her hand on the Bible and repeat after him the following statement:

"I," and giving her name, "swear on the Bible that I did not have any form of sexual contact with my son," so-and-so, "on any occasion, so help me God."

And immediately thereafter the group all went to the local court where an order dismissing the charges against the

plaintiff was submitted for signature and pursuant to this order the criminal charges that had been pending against the plaintiff for allegedly sexually abusing her son were dismissed with prejudice.

On may 7, 1993, the son and the father gave written statements they agreed to the dismissal based on the plaintiff's sworn affirmation denying the charges and that they had done so because they, "preferred the law of God over the law of man."

The Court is relying on Exhibit F, to the notice of motion. That's about all we know about the facts, short of a plenary trial.

The issue before the Court is whether the defendant, Mr. D'Amelia, is immune from suit as a matter of law, either by qualified immunity or absolute immunity.

In the case of *Imbler against Pachtman* 424 U.S. 409 in 1976, the Supreme Court held that a state prosecutor acting in his role as advocate while initiating and pursuing a criminal prosecution is absolutely immune from liability for damages in a civil suit alleging deprivation of the defendant's constitutional rights. There need be no further inquiry once it is established he was acting in his role as an advocate initiating and pursuing a criminal prosecution. There are a large number of cases where prosecutors have stepped away from that traditional role of the mainstream of the work which a prosecutor does and have acted to assist investigators or they've gone along on raids or done things which were not part of the day-to-day work of a prosecutor. And there, when that happens, the prosecutor has only qualified immunity the same as any other police official.

The closest case is the *Schloss* case in our Court of Appeals in 1989 where our Court of Appeals held that there was absolute immunity where a prosecutor conditioned his refraining from prosecution upon the criminal defendant's execution of a release in favor of the municipality from claims of false arrest and the like. And while we sometimes are concerned about

the expansive language in Court of Appeals opinions, this particular decision has some interesting language which seems to apply very closely to this case.

And the Court of Appeals said in *Schloss*: The fact that a conditional decision with regard to prosecution may be protected by absolute immunity, does not mean that the prosecutor may with impunity couple a threat of prosecution with all manner of demands. For example, demands for bribes or sexual favors. A government official does not have absolute immunity for acts that are manifestly or palpably beyond his authority or performed in the clear absence of all jurisdiction. That's at page 291.

And the Court further stated that when a prosecutor acts without any colorable claim of authority he loses the absolute immunity he would otherwise enjoy. They quote from *Barr against Abrams*, 810 F.2nd 358 at 361, a Second Circuit case in 1987.

This Court concludes as a matter of law that a prosecutor does not have "any colorable claim of authority" within the authorities just cited to threaten continued prosecution of criminal charges unless a defendant submits to a prescribed religious ceremony to substantiate her contention that she's innocent.

Under the First Amendment of the United States Constitution, government may not coerce anyone to support or participate in religion or its exercise nor may the Government act in any way which furthers a particular religious sect or group or tends to establish a state religion.

Now the defendant denies what he compelled the plaintiff to do was a religious ceremony. This Court concludes as a matter of law that the procedure was, in fact, religious, as it occurred in a Roman Catholic church by the direction of the prosecutor and the plaintiff was required to swear her innocence on the Bible pursuant to a oath ending with the words: So help me God.

During the ceremony the pastor or priest was allegedly present standing in the back of the church and another clergyman may also have been present. This is a distinctly different type of conduct than requiring or permitting a person charged with a crime to appear in the Grand Jury and swear to a substantially similar oath also ending with the words, so help me God, because it is non-sectarian when it's in the Grand Jury and the activities are largely secular and they're justified by years of tradition. This is what the prosecutor should have done if he intended to close out the prosecution in a manner which would compel her to assert her innocence under oath.

The Court concludes that Mr. D'Amelia also acted outside the scope of his authority and beyond the traditional role of a prosecutor by delegating his decision of whether or not to prosecute the plaintiff to a lay person and by delegating to a lay person any voice or decision as to how the decision of whether or not to prosecute the plaintiff should be reached.

In this case it appears that the defendant gave the plaintiff's estranged husband the authority to determine whether or not the prosecution should proceed and to approve the means by which the prosecution would be discontinued.

This delegation of authority exceeded the scope of Mr. D'Amelia's function as a prosecutor. It was far beyond the role of a District Attorney and totally improper and cannot be claimed that there's immunity because it's so remote from the traditional role for which a prosecutor is immune.

The Court now considers the question of qualified immunity. Under the standard of *Harlow v. Fitzerald*, 457 U.S. 800 (1982), qualified immunity is warranted where an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person, and by that they mean a reasonable public official, would have known. That's quoting from *Harlow* at page 818.

It's argued here these facts are so bizarre that no case in point is found, and I think that argument cuts both ways. This conduct is so clearly outrageous and improper that no one

ever tried it before, and that's why our research has found no case.

The Court recognizes that ordinarily immunity should be decided by the court, but where facts concerning the underlying situation at issue might affect the decision, then it's a question for the jury.

This Court believes that any reasonable person, particularly any reasonable prosecutor trained as a lawyer, would be fully aware of the right of a citizen to be free from governmental coercion of religious exercise.

As long ago as 1943 the Supreme Court, in the *West Virginia Board of Education v. Barnette* case, issued the following language in holding that the state could not compel students to salute the flag in pledge of allegiance and the words of Justice Jackson are: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be Orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

The Court finds that in a wide range of contexts the Supreme Court has consistently prohibited government coercion of religious actions and speech, particularly speech in connection with religious belief. There are cases such as *Wooley against Maynard* where they held the state cannot compel a motto on a motor vehicle license plate. *Abington Township* where they cannot require prayers in school, and the *Russo* case in the Second Circuit in 1972 where the state cannot require a teacher to participate in the pledge of allegiance.

And the Court believes that, in light of the clear prohibition on state compulsion of religion or political speech, in order to defeat a *Harlow* claim the plaintiff need not cite a case previously decided with the exact or similar facts presented here.

It's absolutely clear on this record that the allegedly compelled speech in this case was religious, and the Court concludes that no reasonable official could believe for one

moment that forcing an individual to engage in a religious ceremony in a church comports with the First Amendment.

Now, it's possible that there is a factual dispute in this case concerning the voluntariness of the plaintiff's activity. That goes to a fact issue for trial, the allegation is she voluntarily agreed to give up her First Amendment rights. It's hard to imagine that you can call it a voluntary agreement to give up First Amendment rights when a person extracting the voluntary agreement has told the victim in no uncertain terms that if you don't give up your First Amendment rights, and go through this religious ceremony that I want you to do or that your ex-husband wants you to do, I will continue to press prosecution of the criminal case. And this is true even if we can assume for purposes of our discussion that she was innocent of the crimes charged, because there is the trauma of going through the burden of a criminal trial, it costs money to defend a criminal case, and there's always the risk that there might be a miscarriage of justice. The plaintiff claims she was greatly upset and coerced into engaging in the religious ceremony. She or her lawyer apparently said that at the time.

This Court could take that contention with a small degree of salt. She may have felt she was indeed fortunate not to have to go to trial and it was a worthwhile thing for her to do. But in any event, regardless of her subjective thinking which goes primarily to the issue of damages, if it's relevant at all, the Court finds there was a violation of her constitutional rights here. It's highly doubtful if a trier of fact could truly find voluntariness and the Court need not resolve all of this dispute in order to decide this motion.

The Court concludes as a matter of law that there is neither qualified immunity nor absolute immunity under any of the cases previously cited for the conduct which is alleged to have happened here. If at the trial there may be slight refinements in the facts, the Court reserves its right to take whatever view of the evidence is appropriate when the time comes to charge the jury. But on the facts presented on this motion, it seems to me beyond argument.

The Court appreciates the fact that counsel for the defendant have made a thoughtful and scholarly and I think enthusiastic presentation here. I just simply don't agree, and the motion is denied. This is independently reviewable, so if you want me to stay discovery so you can seek appellate review, I'll give consideration to doing that.

* * *

REMAINDER OF TRANSCRIPT OF PROCEEDINGS DELETED FOR BREVITY

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square
New York 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30 day of October one thousand nine hundred and ninety-six.

Doe

Plaintiff-Appellee

v

Dkt No: 95-7659

Phillips

Defendant

UNITED STATES COURT
OF APPEALS

FILED

OCT 30 1996

GEORGE LANGE III,
CLERK

SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Gerald D. D'Amelia, Jr.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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MacCARTNEY,
MacCARTNEY, KERRIGAN
& MacCARTNEY

No. 96-815

(2)

Supreme Court, U.S.
FILED
FEB 5 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1996

GERALD D. D'AMELIA, JR.,

Petitioner,

FRANCIS D. PHILLIPS, II,

Defendant,

against

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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181 Delaware Street, Walton, NY 13856—800-252-7181
(2879 – 1997)

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QUESTION PRESENTED—

Does an assistant district attorney's dismissal of criminal charges, conditioned upon a defendant's swearing her innocence on a bible in a church, fall outside his prosecutorial function depriving him of absolute immunity?

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BRIEF IN OPPOSITION TO THE PETITION
SUMMARY OF THE ARGUMENT

Until now, it apparently has never crossed the mind of a single prosecutor, either state or federal, to use a forced religious ceremony as a method to dispose of criminal charges. As the District Court observed, "This conduct is so clearly outrageous and improper that no one ever tried it before, and that's why our research has found no case." (A-30)

The instant petition attempts to convince this Court that, given the right set of circumstances, a District Attorney's forcible compulsion of a criminal defendant to perform a religious ceremony in a church can be said to have a secular prosecutorial purpose.

The decisions of the Courts below state the obvious. Petitioner's conduct was performed outside of his role as a prosecutor as that role is historically understood. Petitioner is not entitled to absolute immunity because coerced religious practice serves no legitimate prosecutorial function. Religious-based dispositions have no place within the judicial process.

STATEMENT OF FACTS

Petitioner Gerald D. D'Amelia, Jr. ("D'Amelia") was the Orange County Assistant District Attorney responsible for the prosecution of the criminal charges against respondent Jane Doe ("Doe") and he conditioned dismissal of those charges upon

Doe's swearing on a bible in a Catholic Church that she was innocent.[1] There is no dispute that this religious exercise was not proposed by Doe or her attorney. According to D'Amelia, it was Doe's estranged husband, the father of the alleged victim, who recommended the procedure to D'Amelia, stating "that he preferred that the matter be resolved by the law of God rather than the law of man." (A-137) There is no dispute that D'Amelia implemented what the father "recommended" to him.

Among those present in the chapel during the ceremony were D'Amelia, Doe and her defense attorney Barbara Strauss, the father of the alleged victim, the alleged victim and his brother, a priest and perhaps another priest, the D.A.'s investigator, and Doe's mother and sister. D'Amelia held the bible and read from a prepared statement written in his hand while he had Doe place her hand on the bible and repeat after him. The prepared statement reads as follows: "I, [Jane Doe], swear on this bible that I did not have any form of sexual contact with my son Nicholas on any occasions, so help me God." Doe describes it this way:

> I entered the chapel. Anton [the father] and my children were kneeling, and Mr. D'Amelia was standing at the front of the chapel, and he told me to position myself across from him, and he read a statement and asked me to repeat those words, which I did.

(A-44)

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[1] On October 25, 1992, the police arrested Doe on felony charges that she sexually abused her 14 year old son. On April 30, 1993, D'Amelia advised Doe's attorney, Barbara Strauss, that it was his intention to reduce the felony charges to misdemeanors and prosecute them in the justice court unless Doe agreed to the aforesaid religious exercise.

When the ceremony was concluded, D'Amelia went to the justice court and presented an order of dismissal of all the charges for the court's signature.

ARGUMENT

D'AMELIA IS NOT ENTITLED TO ABSOLUTE IMMUNITY

D'Amelia is not entitled to absolute immunity because his conduct was undeniably outside the scope of his prosecutorial function.

There is no question that a prosecutor's *decision* whether or not to pursue a criminal charge is protected by absolute immunity. But D'Amelia's argument goes much further. He is arguing that "conduct performed in the context of deciding" (Petition, page 4) is also necessarily within the prosecutor's function, no matter what that conduct might be. No court has ever held this.

By applying the required "functional approach" (*see Buckley v Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993)), the Court of Appeals below correctly isolated "the nature of the conduct that was allegedly intertwined with the prosecutorial decision" (A-11) and concluded "that D'Amelia had no colorable claim of jurisdiction *qua* prosecutor to enforce the laws not of man but of God." (A-13) D'Amelia's religious conduct, in other words, is not the functional equivalent of deciding whether or not to prosecute, *See Buckley v Fitzsimmons*, 113 S.Ct. at 2613.

A

"Absolute immunity will apply to a prosecutor's conduct that is 'intimately associated with the judicial phase of the criminal process.' " *Dory v Ryan*, 25 F.3d 81, 83 (2nd Cir. 1994) *quoting Buckley v Fitzsimmons*, 113 S.Ct. at 2614. The decision of whether or not to prosecute, in itself, is one such form of conduct that is always "intimately associated" with the judicial phase. It is a necessary, indeed integral, part of a prosecutor's role as an advocate. But this does not mean that *any* conduct that might be peformed in the context of that decision is likewise "intimately associated" or necessary.

"Deciding whether or not to prosecute" is a distinct, clearly delineated form of conduct. It is an analytical process involving such operations as determining the seriousness of the charges, assessing the sufficiency of the evidence, and evaluating the credibility of the witnesses and character of the accused. Although the variables considered by a prosecutor while "deciding" what to do with a case might be numerous and diverse, it does not follow that his decision-making permits equally numerous and diverse forms of conduct or coercive demands that supposedly assist in the making of the decision. D'Amelia ignores the conceptual difference between "deciding" and "demanding" when he insists that absolute immunity extends not only to the prosecutor's decision, but also to any

conduct which the prosecutor might perform in connection with that decision.[2]

B

D'Amelia cites cases in his Petition (page 14) which make clear that the federal courts have deemed certain prosecutorial demands to be intertwined with the decision whether to prosecute, even when those demands violate a criminal defendant's constitutional rights. What all of these cases have in common, however, and what distinguishes them from the instant case, is that the constitutional rights that were claimed to have been violated by the prosecutor's demands were all *personal* rights. D'Amelia's demand, on the other hand, violated the Establishment Clause which protects a *public* right.[3]

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[2] To ignore this distinction would be dangerous for it would mean that *any* time a prosecutor conditions a dismissal he would be deemed to be acting as an advocate—no matter what that condition might be. As the Second Circuit made clear, this kind of reasoning takes immunity too far:

> The fact that a conditional decision with regard to prosecution may be protected by absolute immunity does not mean . . . that the prosecutor may with impunity couple a threat of prosecution with all manner of demands, for example, demands for bribes or sexual favors. A government official does not have absolute immunity for acts that are 'manifestly or palpably beyond his authority,' *Spalding v Vilas*, 161 U.S. 483, 498, 16 S.Ct. 631, jurisdiction.'(citation)

Schloss v Bouse, 876 F.2d 287, 291 (2nd Cir. 1989). "[W]hen a prosecutor acts without any colorable claim of authority," the Second Circuit continued, "he loses the absolute immunity he would otherwise enjoy." *Id. quoting*, *Barr v Abrams*, 810 F.2d 358, 361 (2d Cir. 1987)

[3] "The 'exercise' of Establishment Clause rights differs from the exercise of most other constitutional rights, in that it is in essence a public matter. . . " *Scarpino v Grosshiem*, 852 F.Supp. 798, 804 (S.D. Iowa 1994)

Prosecutorial demands that infringe upon personal rights may be "intimately associated" with the prosecutorial function because personal rights are routinely balanced against legitimate State objectives; it is well settled that under certain circumstances the State may have a legitimate interest in abridging the exercise of a personal right.[4] But no court has *ever* utilized a balancing test under the Establishment Clause: "Such balancing has never been applied by the Supreme Court in an Establishment Clause case." *Matter of Griffin v Coughlin,* 88 N.Y.2d 674, 694 n 7 (1996), *cert den* ___ U.S. ___ (January 6, 1997). This is because the State *never* has a legitimate interest, no matter what the circumstances, in forcing someone to engage in religious exercise.

In each of the cases which D'Amelia cites—where the claim was based upon the decision whether to continue or dismiss a proceeding—the prosecutor received absolute immunity because he was, in effect, performing an historically recognized balancing process. The prosecutor was balancing the State's objectives against the claimant's personal constitutional right(s), and was therefore engaged in conduct very similar to the balancing routinely engaged in by the courts. This is conduct which is *not* foreign to the prosecutor's function as an advocate precisely

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[4] *See, e.g., Rankin v McPherson,* 107 S.Ct. 2891, 2896-2897 (1987), *quoting and citing Pickering v Board of Education,* 88 S.Ct. 1731, 1734-1735 (1968); *Connick v Myers,* 103 S.Ct. 1684, 1686 (1983): "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "

because it is a recognized function of the judicial process.[5] "Indeed, in deciding whether or not to prosecute, the prosecutor performs a 'quasi-judicial' function." *Imbler v Pachtman,* 96 S.Ct. 984, 998 (1976) Although a prosecutor's—just as a judge's—failure to reach a proper balance might result in a constitutional violation, the balancing process itself remains "intimately associated"—within the meaning of *Imbler v Pachtman*—with the judicial phase of the proceeding.

On the other hand, because no similar form of balancing is *permitted* under the Establishment Clause, D'Amelia's conduct cannot be said to be even remotely associated—let alone "intimately associated"—with any known or historically recognized judicial process. D'Amelia's demand that Doe enter the church with him is simply not part of any historically acknowledged judicial or prosecutorial decision-making process. D'Amelia's demand is something that, in the American legal system, no judicial or quasi-judicial officer ever performs. D'Amelia's religious test, therefore, is completely foreign to the American prosecutor's function as an advocate before the court.

Thus the Second Circuit's rejection of D'Amelia's argument is based upon firmly settled Establishment Clause jurisprudence. D'Amelia only begs the question when he insists that his religious demand was made in the context of his "prosecutorial decision". The fact remains that coercing a defendant to perform a religious exercise is "manifestly" and "palpably" outside the

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[5] The Circuit Courts of Appeals have sometimes described the prosecutor's immunity as a form of "quasi-judicial" immunity, and have referred to it as "derivative" of the immunity of judges. *Imbler v Pachtman,* 96 S.Ct. at 990.

context of any decision which a prosecutor is permitted to make.[6]

The historical traditions of First Amendment jurisprudence are at war with D'Amelia's entire argument.

C

In order for D'Amelia's argument to prevail, he must demonstrate that not immunizing him for his religious exercise will "have an adverse affect upon the functioning of the criminal justice system." *Imbler v Pachtman*, 424 U.S. 409, 426 (1976) This D'Amelia cannot do because there is no historical or practical basis for suggesting that resort to a religious exercise is in any way necessary or "intimately associated" with a prosecutor's ability to perform as an advocate. This is what distinguishes this case from those immunity cases involving the subornation of perjury and falsification of evidence by prosecutors.

Encouraging perjury (*see Dory v Ryan*, 25 F.3d 81), although unethical and immoral, is nevertheless inextricably intertwined—for purposes of absolute immunity analysis—with the prosecutorial functional of preparing a witness. The prosecutorial misconduct cannot be separated from the prosecutorial function without subjecting the prosecutor to unlimited and obstructive inquiry into his motives and decisions when preparing a witness. Similarly, making false representations to prompt a plea bargain (*see Pinaud v County of Suffolk*, 52 F.3d 1139) cannot be functionally separated from the process of plea

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[6] The fact that the idea may have come from the complainant and not from the prosecutor himself is, of course, a distinction without constitutional significance.

bargaining, itself. In such cases, subsequent civil litigation involving the prosecutor's conduct would necessarily impede the functioning of his office because the subsequent inquiry would, by necessity, force *all* prosecutors to make often difficult discretionary decisions regarding the presentation of evidence with the threat of such litigation in mind.[7]

It is this threat to legitimate prosecutors that gives force to the decisions that immunize prosecutors who break the law or act unethically. It is this threat that was the animating principle behind this Court's decision in *Imbler v Pachtman.*

But no prosecutor should feel threatened in any way by the imposition of liability upon prosecutors who require criminal defendants to perform religious exercises. This is precisely because no prosecutor should be considering the imposition of a religious test. No prosecutor should be thinking in such terms.

D

D'Amelia claims that his conduct had a "proper, secular prosecutorial purpose". (Petition, page 15) He states that this purpose was "to ascertain whether or not Doe committed the crime and, ultimately, to determine whether or not the complainants would cooperate in the prosecution." (Petition, page 15)

First, it should be pointed out that this rationale of ε truth finding function did not surface until D'Amelia's appeal to the

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[7] D'Amelia's observation that suborning perjury is more reprehensible than the religious exercise imposed here misses this point entirely. The issue is not which conduct is more reprehensible and should therefore not be immunized. The issue is which conduct is so intimately associated with the judicial process so as to require immunity.

Court of Appeals. Nothing in the trial record even suggests that D'Amelia used the religious ceremony to assist him in ascertaining whether or not Doe was being honest. Rather, D'Amelia initially admitted that the religious condition was imposed at the urging of Mr. Doe, the alleged victim's father.[8]

The uncontroverted record shows that after D'Amelia got the support of his fellow assistant district attorneys,[9] he decided that if Doe went through with the ceremony the charges would be dismissed. Nothing in either D'Amelia's affidavits or his deposition even hints at the idea that if Doe performed the ceremony and D'Amelia thought she was swearing falsely, then the prosecution would go forward. It had been decided ahead of time that if Doe performed the religious exercise, the charges would be dismissed. (Record on Appeal to Second Circuit, A-69) When D'Amelia was escorting Doe into the church, he was no longer in the process of trying "to ascertain whether or not [she] committed the crime" and it is disingenuous for him now to suggest otherwise.

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[8] In fact, D'Amelia's reply affidavit to the District Court (Record on Appeal in Second Circuit, A-203 to A-209) contradicts his present position by making it clear that he arrived at the disposition without ever resolving the issue of credibility: "After consideration of all the evidence, the issues of credibility, the inconsistencies, the position of Mr. Doe and the victim, and plaintiff's affirmation denying the charges, the ultimate disposition was considered as being in the best interests of the parties." (*Id*, A-208)

[9] It should also be noted that although D'Amelia's present attorneys now blame his conduct upon his inexperience, in the lower courts his then attorneys argued that his conduct was *reasonable* because he discussed his scheme beforehand with several other assistant district attorneys and none of them mentioned any problem with it.

Assuming, *arguendo*, that D'Amelia really was trying to determine whether Doe was telling the truth, the fact remains that he has no "colorable claim of authority" to impose a religious test upon a defendant to ascertain whether that defendant is innocent or guilty. D'Amelia's authority consisted of either dismissing the charges because he deemed them unfounded, or prosecuting them and giving Doe the opportunity to testify before the Grand Jury or at trial. His authority did not extend to requiring Doe to accompany him into a church in order to demonstrate that she was telling the truth.

D'Amelia, in effect, argues that as long as he characterizes his coerced church ceremony as truth-finding he acted with a colorable basis of authority and a semblance of jurisdiction, no matter how remote in fact that conduct may be from this particular prosecutorial function. Such logic would require the granting of absolute immunity to a prosecutor who might decide to use the medieval trial by ordeal. Since D'Amelia's truth-finding exercise in the church amounts to an appeal "to divine authority to decide the guilt or innocence of one accused of a crime," *The Columbia Encyclopedia,* Third Edition, page 1159,[10] it is not intellectually far removed from the primitive

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[10]The Columbia Encyclopedia describes the ordeal as follows:

> ancient legal custom connected closely with divination by an ordeal, appeal was made to divine authority to decide the guilt or innocence of one accused of a crime or to choose between disputants. This custom was known to primitive peoples as well as to those of fairly advanced material culture. Until recent times the ordeal was practiced in many parts of Asia and Africa. In the early Middle Ages it was widely used in settlement of legal questions in Western Europe, especially in the Germanic countries. In England it was a regular form of trial and persisted until trial by jury became

(continued...)

truth-finding methodologies that ended with the appearance of trials by jury.

Nevertheless, the dissent below adopts D'Amelia's argument *en toto* by stating that "D'Amelia had reason to think that that oath would fully serve the interests of the complainants, the defendant, the community and the prosecutorial office." (A-21) In effect, the dissent below adopts the reasoning of the medieval religious trial by claiming that Doe's oath in the church "had a secular, prosecutorial purpose . . . to ascertain whether Doe committed the crime and whether the complainants would cooperate in the prosecution." (A-20) The dissent below only concedes that "D'Amelia performed his prosecutorial role in an *unusual* manner". (emphasis added)

Of course, the religious nature of D'Amelia's ritual is not diminished by his—and the dissent's—analogy to the swearing of a witness on the stand. As observed by the Courts below, having Doe stand before the prosecutor in the chapel, place her hand on the bible the prosecutor was holding, and repeat, *verbatim*, the words that the prosecutor read aloud from a script, is quite distinct from asking a witness questions under oath. The latter, as the District Court properly found, is "largely secular" (A-29), while D'Amelia's exercise was devoid of secularity and "was, in fact, religious." (A-28)

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[10](...continued)

common. Forms of the ordeal varied with the locality and with the nature of the crime. The ordeal by fire—walking through fire or putting the hand into a flame—was common, and there were other fiery ordeals, such as walking on hot ploughshares or plunging the hand into molten metal or hot water. Usually it was believed that if the accused was innocent God would spare him. *Id.*

The Establishment Clause was inspired by the lesson that, in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. *Lee v Weisman*, 505 U.S. __, 120 L.Ed.2d 467, 483, 112 S.Ct. 2649 (1992) At a minimum, the First Amendment guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so. *Lynch v Donnelly*, 465 U.S. 668, 678 (1984).[11]

D'Amelia actually argued to the Second Circuit that stripping him of immunity in this case would "send a chilling signal to prosecutors." But the only signal that would be sent—and should be sent—is a command to keep church and state separate. Obeying that command in no way impinges upon the effective functioning of a criminal prosecutor.

The dangerous signal is the one that would be sent if this Court were to accept D'Amelia's argument. One can only imagine the damage to be done by mischievous/righteous prosecutors in many districts across this nation if they were given free rein to utilize all types of religious exercises and tests

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[11] Significant to the ramifications of this case is this Court's warning in *School District of Abington TP., PA. v Schempp*, 374 U.S. 203, 216 (1963):

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' *Memorial and Remonstrance Against religious Assessments, quoted in Everson v Board of Education*, 330 U.S. 1, at 65.

Abington, 374 U.S. at 216. D'Amelia's "experiment" with Doe's liberties clearly went beyond the bounds of his prosecutorial function.

to dispose of criminal cases or to make the local church an annex of the district attorney's office.

CONCLUSION

D'Amelia's conduct was manifestly and palpably beyond his authority as a prosecutor and was not intertwined with any legitimate function of a prosecutor. D'Amelia is therefore not entitled to absolute immunity and the petition for a writ of certiorari should be denied.

Dated: Middletown, New York
January 27, 1997

Respectfully submitted,

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(3)

No. 96-815

Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GERALD D. D'AMELIA, JR.,

Petitioner,

vs.

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 96-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GERALD D. D'AMELIA, JR.,

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VS.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REPLY TO OPPOSITION

Respondent's opposition brief emphasizes the very narrow question this Court has been asked to decide:

> Whether the lower courts erred in creating an unprecedented Establishment Clause exception to the historical protection provided to prosecutors under the doctrine of absolute immunity.

For the reasons set forth herein and in the Petition For A Writ of Certiorari, Petitioner respectfully requests that this Petition be granted so that briefs may be submitted addressing more fully the merits of the important issues raised herein.

ARGUMENT

I. A Prosecutor's Decision Not To Prosecute Is Protected Under the Doctrine of Absolute Immunity

Both Respondent and Petitioner agree that a prosecutor's decision not to prosecute is and should be protected by absolute immunity. *See* Respondent's Brief In Opposition to Petition for A Writ of Certiorari ("Opposition") at p. 3 ("There is no question that a prosecutor's *decision* whether or not to pursue a criminal charge is protected by absolute immunity." (emphasis in original). Respondent argues, however, that "conduct performed in the context of deciding" whether or not to prosecute is *not* protected. *Id.*

In addition to being practically impossible, Respondent's contention in this regard is contrary to well-established precedent of this Court and other Circuits which unequivocally hold that prosecutors are absolutely immune from liability for all acts committed in the course of initiating and pursuing, or opting not to pursue a criminal prosecution. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). Respondent's contention amounts to differentiating, distinguishing or severing a prosecutor's *thought processes* from the *physical conduct* he engages in while carrying out those same thought processes.

In addition to having no basis in logic, this proposition is antithetical to the long line of decisions which apply the doctrine of absolute immunity to prosecutors. *See, e.g.,* decisions cited in the Petition for A Writ of Certiorari ("Petition") at 9-10, identifying specific kinds of prosecutorial conduct which have been found to be protected under the doctrine of absolute immunity.

Respondent incorrectly claims that Petitioner "insists that absolute immunity extends not only to a prosecutor's *decision,* but also to *any conduct* which the prosecutor might perform in connection with that decision." Opposition at p. 4-5 (emphasis added). Petitioner makes clear that willful misconduct *with no public function,* which serves purely personal

interests should not be protected by absolute immunity. *See* Petition at p. 12; *see also, Doe v. Phillips,* 81 F.3d 1204, 1214 (2d Cir. 1996) ("There is a difference between performing one's office, however disgracefully and offering to sell it for purely personal benefit.") (Jacobs, J., dissenting); *Schloss v. Bouse,* 876 F.2d 287, 291 (2d Cir. 1989) (offering examples of misconduct without any public function, like demanding a bribe, or sexual favors, which may not be protected by absolute immunity).

Since the prosecutorial conduct at issue was part and parcel of the public prosecutorial function and was not engaged in for personal gain, D'Amelia is entitled to absolute immunity.

II. There is No "Establishment Clause Exception" To The General Rule That Prosecutors Are Immune Under § 1983 For Conduct Performed In the Course Of Performing Their Prosecutorial Duties

Respondent argues that violations of the Establishment Clause must be treated differently than other constitutional violations. This argument, too, is fatally flawed.

In a desperate attempt to distinguish clearly indistinguishable cases, Respondent argues that prosecutors should be entitled to absolute immunity, but only if, while performing official duties, they violate constitutional rights *other than the Establishment Clause.* According to Respondent, that is because the Establishment Clause protects a *"public"* right rather than a *"personal"* right. *See* Opposition at p. 5-6 and n.3, *quoting Scarpino v. Grossheim,* 852 F. Supp. 798, 804 (S.D. Iowa 1994). But, *Scarpino* involved the issue of *qualified* immunity with respect to public officials and not absolute immunity for prosecutors. Analysis under the doctrine of qualified immunity differs markedly from the analysis under the doctrine of absolute immunity. *Scarpino* is inapplicable.

More importantly, this Court has unequivocally rejected the notion of carving out *any* exception to the general rule that prosecutors are absolutely immune under Section 1983 for all

acts, even inappropriate, misguided and/or unconstitutional acts, which are committed in the course of conducting their duties as prosecutors, even though such immunity might leave those genuinely wronged without civil redress. *Imbler v. Pachtman,* 424 U.S. 409, 431 n. 34 (1976).

The unprecedented Establishment Clause exception to absolute immunity carved out by the lower courts is in direct contradiction to this Court's pronouncements and should be rejected outright.

III. The Circumstances and Motivations Of A Prosecutor Are Irrelevant In The Context of Absolute Immunity

Respondent's colloquy with respect to the "historically recognized balancing process" by which a prosecutor "balanc[es] the State's objectives against the claimant's personal constitutional right(s)" prior to violating a defendant's constitutional rights is, frankly, perplexing. *See* Opposition at p. 6-7. Respondent appears to be contending that prosecutors who violate defendants' constitutional rights actually engage in some mental process by which they weigh the particular constitutional violation contemplated against the "interest of the state" in having that individual prosecuted or incarcerated.

Query whether the prosecutors in *Imbler v. Pachtman,* 424 U.S. 409 (1976), in which absolute prosecutorial immunity was found to apply, "balanced" the rights of the defendant against the interest of the State before engaging in the conduct alleged to have violated defendant's constitutional rights. Similarly, in *Hill v. City of New York,* 45 F.3d 653 (2d Cir. 1995), it is doubtful whether the prosecutor who allegedly unjustifiably removed defendant's children, directed her arrest without probable cause, maliciously prosecuted her, conspired to present false evidence against her, withheld exculpatory evidence from the court, and deliberately suppressed *Brady* material "balanced" defendant's rights against those of the state before engaging in those egregious, but nonetheless protected acts.

In any event, this Court has made clear that the circumstances and motivations of a prosecutor's actions are irrelevant in analyzing whether absolute immunity should apply. *See, Imbler v. Pachtman,* 424 U.S. 409, n.13 (1976) (citations omitted). *See also Dory v. Ryan,* 25 F.3d 81, 83 (2d Cir. 1994) (absolute immunity "protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, which are associated with his function as an advocate.") Circumstances and motivation are considered only when analyzing the doctrine of qualified immunity. *Id.*

As set forth more fully in the Petition, these analytical distinctions are critical to a proper analysis of whether or not absolute immunity should apply in this instance to protect Prosecutor D'Amelia. *See* Petition at pp. 11-12. Thus, Respondent's claim that "balancing is [not] *permitted* under the Establishment Clause" is of no moment. *See* Opposition at p. 7 (emphasis in original).

IV. The Oath/Affirmation at Issue Had A Proper and Secular Prosecutorial Purpose

Respondent proclaims that Prosecutor D'Amelia cannot prevail because ". . . there is no historical or practical basis for suggesting that resort to a religious exercise is in any way necessary or (intimately associated) with a prosecutor's ability to perform as an advocate." *See* Opposition at p. 8. However, when one removes the bias inherent in this mischaracterization[1] of the conduct at issue as a "religious exercise," and substitutes the phrase "an affirmation of truth in the form of an oath ending in the words 'So help me God'," the fallacy of Respondent's assertion becomes clear.

Clearly, there is in fact a "historical or practical basis" for requesting an oath or affirmation of innocence in exchange for an agreement to dismiss criminal charges, particularly in circumstances where a prosecutor is faced with serious criminal

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[1] As set forth in the petition, the conduct at issue was not a "religious exercise" since it had a proper secular, prosecutorial purpose.

charges but has doubts about whether the allegations are true, or if true, whether the evidence will support a conviction.[2]

The historical use of an oath in legal proceedings by prosecutors and judges to verify an individual's veracity is well-documented. As succinctly declared by one court:

> "A man of the most exalted virtue . . . cannot be heard . . . without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice. . . ."

Atwood v. Welton, 7 Conn. 66, 72 (1828). *See also,* Note, *A Reconsideration of The Sworn Testimony Requirement Securing Truth in the Twentieth Century,* 75 Michigan L. Rev. 1681 (1977).

Indeed, the common-law oath/affirmation is rooted in the ancient concept of *judicium dei,* or "divine judgment." As noted by Respondent, these early forms of proof included, *inter alia* compurgation, trial by ordeal, and trial in battle. *See* Opposition at p. 11; *see also,* Schreiber, Aaron, M., *The Jurisprudence of Dealing With Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches In Medieval Criminal Law, Jewish Law and the United States Supreme Court,* 11 Pace L. Rev. 535 (1991).

Currently, the Federal Rules of Civil Procedure provide that a "solemn affirmation" may be accepted in lieu of an oath

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[2] Respondent claims that there is no support in the "trial record" that D'Amelia used the oath/affirmation to ascertain whether or not Doe committed the crime. Opposition at 10. First, in keeping with the spirit of the doctrine of absolute immunity, which is to avoid trial, there was no trial. Hence, there is no "trial record" as Respondent has represented. Secondly, Respondent admits that D'Amelia made his decision not to prosecute: "After consideration of all the evidence, the issues of credibility, the inconsistencies, the position of Mr. Doe and the victim, *and* plaintiff's affirmation denying the charges. . . ." Opposition at n.8 quoting D'Amelia's Reply Affidavit to the District Court contained in the Record on Appeal, A-208. Clearly, the oath/affirmation was, in fact, used in the prosecutorial decision-making process.

which ends in the words "So help me God." Fed. R. Civ. P. 43(d); Fed. R. Evid. 603. This continued use of the oath by lawyers and judges does not, as Respondent suggests, presage a return to the medieval use of trial by ordeal. Opposition at p. 11-12.

It is significant that Doe does not claim that she is an atheist, or that she was offended by the use of the words "So help me God." Moreover, Doe was not, in fact, forced to take the oath/affirmation. In actuality, after Prosecutor D'Amelia communicated to Doe's attorney the option of swearing to her innocence at her own family's church in exchange for a dismissal of the criminal charges, Doe did not hesitate, after consulting with her attorney, to agree to do so. The option was presented by D'Amelia to Doe's attorney on or about April 30, 1993; Doe's attorney communicated Doe's agreement to accept the option by letter dated May 7, 1993. (JA-A69).

The prosecutorial acts at issue -- communicating the option for dismissal of the charges to Doe's attorney and coordinating the events agreed to by Doe which culminated in the dismissal of the charges -- were "deemed" to be coercive by the lower courts solely because of D'Amelia's role as a prosecutor. (A-14). Such a holding is contrary to this Court's repeated rulings in this area.

It is essential that the instant Petition be granted in order to reverse the lower court decisions which qualify the doctrine of absolute immunity to exclude its application completely to cases which implicate the Establishment Clause. The oath/affirmation at issue had the valid, secular prosecutorial purpose of assisting Prosecutor D'Amelia in making a determination not to pursue criminal charges. D'Amelia's conduct in this regard may have been imprudent, but there is no question that he neither possessed nor expressed any preference with respect to the nature of the oath or the location in which it was administered. It was the Complainant who suggested this resolution, and it was Doe and her attorney who agreed.

More importantly, in the context of absolute immunity, there is no basis upon which to treat an alleged violation of the Establishment Clause differently from any other constitutional right, privilege or protection. The lower Courts were wrong to do so.

Conclusion

For all the foregoing reasons, and the reasons contained in the Petition, Petitioner respectfully requests that certiorari be granted.

Dated: February 13, 1997
Goshen, New York

Respectfully submitted,

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